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Supreme Court of the United States

OCTOBER TERM 1949

No. .....

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
HAMPORTZOON CHOOLOKIAN,
Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,
Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
HAMPORTZOON CHOOLOKIAN,
Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Your petitioner, HAMPORTZOON CHOOLOKIAN, respectfully prays that a writ of certiorari issue to review a decision of the Court of Appeals of the State of New York, made on October 20, 1949, which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, made on the

31st day of January, 1949, which affirmed two orders of the said Supreme Court, in and for the County of New York, entered on the 2nd day of January, 1948.

In support of his petition, your petitioner respectfully shows to this Honorable Court:

A

STATEMENT OF THE MATTER INVOLVED

I. The parties and the nature of the decision sought to be reviewed.

Your petitioner is the father of Albert, George and Alice Choolokian, who are minors. The Mission of the Immaculate Virgin and The New York Foundling Hospital are Roman Catholic child-care institutions in the City of New York. At the time of the issuance of the writs hereinafter mentioned, the Mission of the Immaculate Virgin had the physical custody of Albert and George Choolokian, and The New York Foundling Hospital had the physical custody of Alice Choolokian. The legal custody of all of the said three children was, under the laws of the State of New York, in the Commissioner of Welfare of the City of New York. On October 31, 1947, your petitioner, being desirous of obtaining the custody of his said children, obtained two writs of habeas corpus out of the Supreme Court of the State of New York,—one directed against the Mission of the Immaculate Virgin directing it to produce the bodies of the said Albert and George Choolokian, and the other directed against The New York Foundling Hospital directing it to produce the body of the said Alice Choolokian. The decision sought to be reviewed affirmed the dismissal of the said writs, and the remand of the said Albert and George Choolokian to the custody of the Mission of the Immaculate Virgin, and the said Alice Choolokian to the custody of The New York Foundling Hospital. By reason of the circumstance that the legal custody of the said children was, under the laws

of the State of New York, in the Commissioner of Welfare of the City of New York, the said Commissioner was made a party respondent to the proceedings under the said writs in the course of the same.

II. The nature of the litigation which resulted in the decision sought to be reviewed.

(a) The circumstances under which the respondent-institutions obtained custody of petitioner's minor children.

The circumstances under which your petitioner's said minor children came into the custody of the aforementioned two institutions, are as follows:

Your petitioner is an Armenian by birth, having been born in the year 1899, in the Town of Kanus, in the then province of Armenia, of the Turkish Empire, now the Republic of Armenia, one of the constituent Republics of the Union of Soviet Socialist Republics. In 1913 your petitioner came to the United States, and in 1929 he became a naturalized citizen thereof. Your petitioner is married to Ashken Choolokian; and the above named three children, together with three other children to be referred to hereinafter, are the children of the said marriage. All of the said children were born in the United States,—the youngest, Alice by name, on December 14, 1941. Within two months after the birth of the said child, your petitioner's wife became mentally ill and was committed to Kings Park Hospital, a State institution, located at Kings Park, Long Island, in the State of New York, where she remained until released therefrom on November 1, 1947, in order to accompany your petitioner to Soviet Armenia (fols. 225, 231, 240, 445, 574, 587, 1157, 1174-1175).

Your petitioner is a shoemaker by trade; and at the time of the birth of his said last child and the illness of his wife he did not have steady employment. He was unable to take care of his six children, the oldest of whom was then 11 years of age; and he therefore applied to

the Department of Welfare of the City of New York for assistance. At the suggestion of the said Department he voluntarily turned over the custody of his children to the said Department; and the Department thereupon, under the laws of the State of New York, placed the said children with the above named two institutions,—the infant Alice with The New York Foundling Hospital, and the other five children with the Mission of the Immaculate Virgin (fol. 1175-1179).

Your petitioner is a member of the Armenian Apostolic Orthodox Church; and all of his children, except the youngest, Alice, were baptized in the said Church. In 1944, Alice, who had up to that time not been baptized, and the other 5 children, were baptized in the Roman Catholic Church at the insistence of the said two institutions, who made it a condition of the children's remaining in their care, there being no institution of your petitioner's own faith, nor any Protestant institution which could take care of them. Your petitioner has always desired to bring up his children in his own faith; and he only consented to have his children baptized in the Roman Catholic Church because forced to do so by the circumstances hereinbefore recited. He still desires to have his children brought up in his own faith (fols. 243, 632, 675-711, 723-734, 793-796, 914-915).

Subsequently, your petitioner's economic conditions having improved, he sought and obtained the custody of his oldest three children. The Department of Welfare thereupon ordered their release by the Mission of the Immaculate Virgin and Susan, Anthony and Anna Choolokian were accordingly released in August and September, 1946 (fol. 1179).

(b) The reasons for your petitioner seeking to obtain the custody of his children, and the circumstances which led to his suing out the writs of habeas corpus involved in the present litigation.

About the time when your petitioner sought and obtained the custody of his three older children, a movement

began among Armenians residing in the United States for their repatriation to the Republic of Armenia; and negotiations began between the Government of the United States and the Union of Soviet Socialist Republics with a view to facilitating the repatriation to Soviet Armenia of such Armenians, resident in the United States, who might desire to go to Armenia, including the expatriation of Armenians who were citizens of the United States (fols. 101-103, 261-279, 315-319, 593).

These negotiations resulted in a compact or agreement evidenced by an exchange of official notes between the Department of State of the United States and the Embassy of the U. S. S. R. in the United States approving such plan; and at the same time a committee, known as the Committee for the Repatriation of Armenians, was organized among Armenian residents in the United States (fols. 261-279).

The text of the notes exchanged between the Government of the United States and the Government of the U. S. S. R., is as follows:

"The Embassy of the Union of Soviet Socialist Republics presents its compliments to the Department of State and has the honor to communicate the following:

The Government of the U. S. S. R., in accordance with numerous requests from Armenians living abroad, has authorized the Government of Soviet Armenia to organize the return of Armenians wishing to emigrate to their homeland in Soviet Armenia from a number of countries, including the United States.

In this connection the Embassy requests the Department of State to render assistance to Armenians wishing to emigrate to their homeland in granting permission for their emigration, the export of property belonging to them, the relinquishment of foreign nationality, et cetera.

Embassy of the Union of Soviet Socialist Republics
Washington April 21, 1947"

(Exh. F, fols. 1147-1149.)

"The Department of State has received the note of April 21, 1947 from the Embassy of the Union of Soviet Socialist Republics in which the assistance of the Department of State is requested in connection with the emigration of Armenians from the United States to the Soviet Union. It is presumed that some of the prospective emigrants in question are American citizens.

American citizens, or alien residents of the United States except German or Japanese nationals, who desire to emigrate to the Soviet Union are freely permitted to do so. No exit visas are required, and such emigrants are at liberty to take their personal property with them. American citizens may voluntarily relinquish their American citizenship by making a formal declaration of allegiance to a foreign country in accordance with the laws thereof.

While the Government of the United States will interpose no objections to the departure of persons of Armenian origin from the United States to the Soviet Union, it cannot fail to bring to the attention of the Embassy two categories of persons in the Soviet Union who, notwithstanding all their personal efforts and the repeated representations of the American Embassy in Moscow, have not been permitted to leave the Soviet Union for the United States. The first category consists of persons with claims to American citizenship who have been forcibly removed to the Soviet Union from various countries of Eastern Europe. All efforts of the American Embassy in Moscow to obtain permission to interview these people with a view to establishing their American citizenship and arranging for their return to the United States have been fruitless. The second category of persons consists of a relatively small number of Soviet women married to American citizens who for many months, and in several cases, years, have sought permission to leave the Soviet Union in order to join their husbands in the United States. The continued refusal of the Soviet authorities to permit the departure of these wives of American citizens is incomprehensible to the Government and the people of the United States.

In assuring the Embassy that no difficulties will be experienced by persons of Armenian origin in the United States who desire to emigrate to the Soviet

Union, the Department of State requests the favorable consideration of the Soviet Government for the facilitation of the departure to the United States of the two categories of persons mentioned.

Department of State,
Washington, May 28, 1947."

(Exhibit G, fols. 1150-1155.)

After the exchange of the said notes, the Government of the U. S. S. R. worked out a plan whereby all repatriated Armenians were to be taken care of with respect to their economic as well as their cultural needs. Your petitioner thereupon decided to give up his American citizenship and to return to Armenia, and to take his family along with him, so that his immediate family could be reunited and join his relatives who were then in Armenia. He believes that the emigration to Soviet Armenia would be to the best interests not only of himself, but of his wife and children, as they would be enabled to live together, and he would be able to bring up his children in his own faith (fols. 217-223, 248, 254, 261-279, 315-340, 380).

In pursuance of his said decision he communicated with the said Committee and the Consulate of the USSR in the City of New York; and arrangements were thereupon made for himself and his family to depart from the Port of New York on the SS. Rossia, a vessel provided for that purpose by the Government of Soviet Armenia, which was to sail from the said port on November 1, 1947, carrying with it about 160 other Armenians, residents of the United States, desiring to be repatriated to Soviet Armenia. As part of the said arrangement your petitioner did, at the request of the consulate of the U. S. S. R., execute a document renouncing his American citizenship and pledging allegiance to the Government of the U. S. S. R. (fols. 217-223, 245, 268-270, 317, 333-340, 585-593).

After the said arrangements had been made, and on or about October 24, 1947, your petitioner applied to the Department of Welfare of the City of New York for the

release into his custody of his three younger children, Albert, George and Alice; and the said Department of Welfare agreed to release the said children into his custody, and directed the two respondent institutions to deliver the said children into his custody. But the said two institutions refused to deliver the said three children into the custody of your petitioner, for the alleged reason that in Soviet Armenia the said children would not receive the secular and religious education satisfactory to the said institutions, and particularly that they would not be brought up in the Roman Catholic religion (fols. 542-544, 595, 599, 1091).

Thereupon your petitioner sued out from the Supreme Court of the State of New York, the writs of habeas corpus which ultimately resulted in the decision of the Court of Appeals of the State of New York sought to be reviewed.

(c) The proceedings in the Courts of the State of New York.

The writs of habeas corpus were signed by a Justice of the Supreme Court of the State of New York on October 31, 1947, and directed the two respondent institutions, respectively, to produce the said children before the said Justice on November 1, 1947, at 8 A. M.,—the said SS. Rossia being scheduled to sail from the Port of New York in the forenoon of that day. On the morning of November 1, 1947, the respondent institutions appeared by attorneys and interposed identical returns (fols. 63-65, 89-91) which, after some formal denials, set up the following matter by way of defense:

> "That said infants and each of them is a natural born citizen of the United States of America having been born in the Borough of Manhattan, City, County and State of New York.
>
> That the petitioner, Hamportzoon Choolokian, the father of said infants, is, upon information and belief, unable to properly maintain, care for and educate said children or either of them and the mother of said infants is a person of unsound mind and unable to properly care for, maintain and educate said children or either of them.

That upon information and belief, the petitioner seeks to take said children and each of them into a foreign country presently operating under a system of law and education wholly different from the system of law and education in force in the United States of America and in the State of New York and under which said children were born and have so far been raised, educated and maintained.

That upon information and belief, the transfer of each of said children into such foreign land and under such conditions will be detrimental to the physical, mental, spiritual and educational welfare of said children, and each of them and neither of said children will receive appropriate care, maintenance and education or spiritual care in the said foreign land to which the petitioner proposes to take said children."

(Fols. 63-65, 89-91.)

The statement in the said returns as to the alleged inability of your petitioner properly to take care of and maintain his said minor children was contrary to the facts, as then known to the said answering institutions. Your petitioner is informed and verily believes that said statement was made not in good faith, but merely as a subterfuge to enable said institutions to detain said minors in their custody, so that they could rear them in the Roman Catholic religion, and otherwise in accordance with the ideas of said institutions as to the proper education that said children should receive, thereby also to prevent your petitioner from taking his children with him to Armenia and bringing them up in his own faith and in accordance with his own ideas as to their proper secular and religious education.

Thereafter, a hearing was had before the said Justice in the course of which it was conclusively established that arrangements had been made for the proper care and maintenance of the said minor children in Soviet Armenia during their minority, and for their education in the faith and in accordance with the ideas of your petitioner. Among other things it appeared at the said hearing that the Department of Welfare of the City of New York had investi-

gated the plans hereinbefore referred to under which your petitioner and the other Armenians were to be repatriated to Soviet Armenia; and that after such investigation the said Department, as hereinbefore stated, ordered the release of the said children into the custody of your petitioner as in the best interests of the said children. It appeared, among other things, that the said Department, before ordering the release of the said children, procured from the Consulate General of the U. S. S. R. in the City of New York a document reading as follows:

"CONSULATE GENERAL OF THE UNION OF
SOVIET SOCIALIST REPUBLICS
7 East 61st Street
New York 21, N. Y.

October 31, 1947

Commissioner of Welfare
of the City of New York
902 Broadway
New York 10, N. Y.

Dear Sir:

This is to inform you that Mr. Hamportzoon Choolakian has completed plans to take his three children, Albert, George and Alice, who are in your custody, to Soviet Armenia under plans which he has made with the Committee to Aid the Repatriation of Armenians and with the Consulate General of the Union of Soviet Socialist Republics.

This is to assure you that the transportation expenses of Mr. Choolakian and his family have already been provided by the Government of Soviet Armenia and that the Consulate General of the Union of Soviet Socialist Republics in New York guarantees that Mr. Choolakian's said children will not only be adequately transported to Soviet Armenia, but, in addition, that an adequate plan has been made for the care of these children in Soviet Armenia after their arrival there by their own parents or their relatives. We further guarantee that in the event that their parents or relatives will not be able to provide adequate care for these children, that the Soviet Armenian Government,

through the Ministry of Social Security and the Ministry of Education of Soviet Armenia, will provide such care as will best serve the interests of these children.

Very truly yours,

LEONID N. FEDOTOV,
Secretary

LF/al"

(Exh. 18, fols. 1138-1141).

The respondent-institutions were well aware of these facts at the time they made their said returns, and they were also aware of the fact, which was proved in the said proceedings, that your petitioner's wife, who had up to then been confined, because of her mental illness, at the Kings Park Hospital in the legal custody of the Commissioner of Mental Hygiene, had been ordered released by the said Commissioner, so that she might join your petitioner in returning to Soviet Armenia—*her situation, in so far as the State of New York was concerned, being no different from the situation of petitioner's three children involved in the said writs of habeas corpus.*

During the said proceedings your petitioner, through counsel who argued on his behalf and in support of his demand for the custody of his said children, submitted to and urged upon the said Justice that the remand of the said children to the custody of the institutions-respondent would be in violation of rights guaranteed to your petitioner by the Constitution of the United States, Section 800 of Title 8 of the U. S. C. A., the compact or agreement entered into by the Government of the United States with the Government of the U. S. S. R., and was contrary to the policy of the United States as established by its adhesion to the Declaration of Human Rights adopted by the United Nations. But notwithstanding the said proof and the said contentions, the said Justice dismissed the said writs and remanded the said children to the custody of the respondent-institutions, respectively, thereby depriving your petitioner of his said rights. Thereupon, your petitioner appealed

from the orders of the said Justice, dismissing the said writs, to the Appellate Division of the Supreme Court of the State of New York, which said Court affirmed the said decision. Thereupon your petitioner appealed from the last mentioned decision to the Court of Appeals of the State of New York, which said Court affirmed the decisions of the lower Courts. In the said Appellate Courts your petitioner again invoked the protection of the Constitution of the United States with respect to the rights guaranteed to him thereby, and also invoked the protection and claimed the rights accruing to him by the provisions of Section 800 of Title 8 of the U. S. C. A., and under the compact or agreement entered into between the Government of the United States and the Government of the U. S. S. R., and the policy of the Government of the United States hereinbefore mentioned and referred to (fols. 356, 604-606, 1118-1121, 1245-1271).

III. The importance of the matter to the Armenians resident in the United States, and to all persons interested in civil liberties and religious freedom.

Your petitioner respectfully submits that the matter involved in this petition is of the greatest importance not only to your petitioner, his children involved herein, and the rest of his family, but also to all Armenians resident in the United States, and to all persons in the United States interested in the preservation of civil liberties and religious freedom.

As already stated, your petitioner's decision to return with his family to Soviet Armenia was made as part of a general movement among Armenians resident in this country to return to Armenia. This movement among Armenians residing in this country was part of a movement among Armenians throughout the world to return to their ancient homeland, very much akin to the movement among Jews throughout the world to return to their

ancient homeland and establish the State of Israel. Because of centuries of subjugation by the Turkish Empire, Armenians have become dispersed throughout the world, much like the Jews; and many of them therefore desired to return to their ancient homeland and re-establish their ancient culture therein. And as in the case of the Jews, the Government of the United States manifested a great interest in the movement, and made it part of its public international policy to further the said movement. The Repatriation Plan hereinbefore referred to, and the compact or agreement between the Government of the United States and the Government of the U. S. S. R. evidenced by the exchange of notes set forth above, was the result of a desire by both the Government of the United States and the Government of the U. S. S. R. to further the said objective.

As this Court may take judicial notice of matters of public notoriety, your petitioner respectfully calls the attention of the Court to an item which appeared in the New York Times on November 2, 1947, the day after the SS. Rossia sailed from the Port of New York for Armenia, in which it is reported that a spokesman for the Committee to Aid the Repatriation of Armenians had stated that about 38,000 Armenians residing in this country had registered with that Committee, expressing their desire to return to Armenia; and also that among the Armenians departing for Soviet Armenia on the SS. Rossia there were about forty children. As it is a matter of public knowledge and of public record that no large influx of Armenians into the United States took place since the outbreak of World War II on September 1, 1939, it is obvious that most, if not all, of the children who sailed on the SS. Rossia must have been born in the United States. The question of what a State may do to prevent minor children of Armenian parentage born in the United States from going to Soviet Armenia is, therefore, a matter of the greatest importance to all those Armenians who may desire to return to their ancient homeland; and the question of whether a State

may prevent the minor children of such Armenians from going with their parents to Soviet Armenia, on political or religious grounds, is a matter of the greatest importance to all those who are interested in the preservation of civil liberties and religious freedom. The power asserted by the State of New York in the decision here sought to be reviewed, if it exists, may be exercised not only upon those minors who may through fortuitous circumstances be in the custody of its welfare agencies, but upon all minors who may be resident in that State. And if the State of New York possesses that power, all other States in the Union likewise possess that power.

That the matter is of the greatest public importance is shown by the fact that this case has received the widest publicity at the time of the sailing of the SS. Rossia, and has also received considerable publicity ever since, whenever the matter came up before the Courts of the State of New York. The said publicity was not confined to the metropolitan press of the City of New York, nor to the daily press alone. Shortly after the dismissal of the writs of habeas corpus by the Special Term of the Supreme Court of the State of New York, the matter was discussed in a long editorial in a well known national weekly; and nearly a year later, to wit, on September 29, 1948, the Christian Science Monitor carried a long article on the subject from its New York correspondent—occasioned by a statement issued by Bishop Charles K. Gilbert of the Protestant Episcopal Church, Bishop Tiran Nersoyan of the Armenian Apostolic Orthodox Church, and Dr. Robert W. Searle of the Protestant Council of the City of New York.

The great public interest in this case, both from the point of view of civil liberties and religious freedom, is also evidenced by the fact that the American Civil Liberties Union and two religious organizations, to wit: the Prelacy of the Armenian Church in North America, and the Protestant Council of the City of New York, appeared and

filed briefs as *amici curiae* in the proceedings before the Supreme Court of the State of New York, New York County, and also in the Appellate Courts of the State of New York, in support of your petitioner's efforts to obtain the custody of his said children.

B

THE QUESTIONS PRESENTED

The questions presented concern basic federal relations; fundamental rights guaranteed by the United States Constitution and the several amendments thereto; Acts of Congress confirming and defining those rights; rights claimed under a compact between the United States and a foreign government; and the public policy of the United States, to wit:

I. May a State, by legislation or through its executive or judicial departments, act in the domain of foreign relations, exclusively reserved by the Constitution of the United States to the Federal Government, so as to substantially affect the same?

II. May a State, by legislation or through its executive or judicial departments, assert its police power over unoffending persons leaving, or who desire to leave, its territory, in order to go to a foreign country?

III. May a State, by legislation or through its executive or judicial departments, prevent the departure from its territory of such persons, where their attempt to depart is in pursuance of a compact or agreement between the United States and a foreign government?

IV. May a State legislate, or otherwise act, with respect to the fundamental right of expatriation guaranteed by the United States Constitution and defined and covered by Congressional legislation?

V. More specifically, may a State, by legislation or through its executive or judicial departments, limit or abridge the fundamental right of expatriation guaranteed by the Constitution of the United States, and confirmed by Section 800 of Title 8 of the U. S. C. A., and more particularly defined by Section 807 of Title 8 of the U. S. C. A.?

VI. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the right of a father to determine temporarily and conditionally the nationality of his minor children granted to him by Section 807 of Title 8 of the U. S. C. A.?

VII. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father, guaranteed by the Constitution of the United States, to the custody, care and education of his minor children—except where, by reason of moral unfitness or mental incapacity of the father, it becomes the duty of the State to care for the children, while they remain residents thereof?

VIII. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the care and education of his minor children, guaranteed by the Constitution of the United States, for the specific reason that he intends to give them a secular or religious education not approved of by the State or its agencies?

IX. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the custody of his minor children, guaranteed by the Constitution of the United States, for the reason that the father desires to use such custody in order to take the children to a foreign country where they would be exposed to a system of secular and religious education not in conformity with "the American way of life"?

X. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the custody of his minor children, for the reason that the father desires to use such custody in order to take the children to a foreign country—in the face of the declared policy of the United States as embodied in its adhesion to the Declaration of Human Rights of the United Nations, and the specific compact or agreement between the Government of the United States and the Government of the U. S. S. R., whereby the United States agreed to the expatriation of Armenians resident in the United States, the renunciation of the citizenship of such of them as may be citizens of the United States, and assured the Government of the U. S. S. R. that the Armenians covered by the said compact or agreement would experience no difficulties if they should desire to emigrate to Soviet Armenia?

C

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is clear from the foregoing, that the instant case presents basic constitutional questions under the distribution of powers provided for by the United States Constitution, whereby the United States is constituted a sovereign nation—the only sovereign power under the Constitution with respect to foreign nations, to the exclusion of the individual States of the Union, and having sole jurisdiction in all matters affecting the foreign or international relations of the Nation, and particularly Article II, Section 2 thereof, which places the treaty-making power of the Nation in the Federal Government exclusively; under the First Article of Amendment to the Constitution of the United States which guarantees freedom of religion, freedom of conscience and of thought; under the Eighth Article of Amendment which prohibits cruel and unusual punishment; under

the Ninth Article of Amendment which protects the fundamental personal rights not specifically enumerated in the Constitution or other Articles of Amendment, including the natural right of a father to the custody and education of his children, and the right of expatriation; under the Fourteenth Article of Amendment which (1) makes citizenship in the United States primary and citizenship in a State derivative, dependent upon residence therein, and therefore inapplicable to persons seeking to depart therefrom, (2) prohibits the States from making any laws abridging the privileges or immunities of citizens of the United States, including the right of departing therefrom, (3) enjoins the States against depriving any person of life, liberty or property without due process of law, and (4) enjoins the States against depriving any person of the equal protection of the laws; under Section 800 of Title 8 of the U. S. C. A., which expressly confirms the fundamental right of expatriation, and Section 807 of the said Title which gives to citizens and residents of the United States the right to take their American born children to foreign parts, and protects the United States citizenship of such minor children; and under the Supremacy Clause of Article VI of the United States Constitution, which makes treaties, compacts and agreements, of the United States with foreign powers, and its declared policy in foreign relations, the supreme law of the land.

It is equally clear that the decision sought to be reviewed deprive your petitioner, his three children directly involved herein, and the rest of his family, of the constitutional, statutory, and other rights contended for by him, and that the matters involved herein are of great public importance, directly to a large section of the citizens and inhabitants of this country who may desire to emigrate to Soviet Armenia under the compact or agreement between the United States and the Government of the U. S. S. R. with respect to Armenians resident in the United States, and indirectly to all citizens and residents of the United States because of the questions of freedom of conscience, freedom

of thought and freedom of religion involved in the decision sought to be reviewed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings herein and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated: New York, January 10, 1950.

SAMUEL M. BLINKEN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1949

No. .....

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI

The Justice of the Supreme Court of the State of New York before whom the proceedings on the writs of habeas corpus herein were had, wrote a long opinion clearly showing that the defenses alleged by the returns of the respondent-institutions raised matters of exclusively Fed-

eral cognizance, but he ignored this fact as well as the constitutional questions raised by counsel for petitioner and the counsel for the *amici curiae* who appeared in support of petitioner's demand for the custody of his children. This opinion is printed in the Record at pages 386-398 and is officially reported in 192 Misc. 454. The Appellate Division wrote no opinion. The Judges of the Court of Appeals wrote two opinions which appear at pages 436-437 of the Record and are officially reported in 300 N. Y. 43. These opinions make no reference to the constitutional questions involved. However, in an order made on December 29, 1949, the Court of Appeals, on petitioner's motion, amended the "Remittitur" by adding thereto the following:

> "This court has necessarily passed upon, and overruled, the contention of relator-appellant that the orders below had violated his absolute right to recover custody of his children in order to take them with him to Soviet Armenia; which right appellant had asserted as derived from the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, from Section 800, Title 8, United States Code, and from the exchange of notes between the United States Government and the Union of Soviet Socialist Republics, dated April Twenty-one and May Twenty-eight, 1947" (p. 444).

A

THE DECISION SOUGHT TO BE REVIEWED LIES IN A FIELD ENTIRELY BEYOND THE REACH OF STATE POWER

The writs of habeas corpus involved herein were obtained because the two institutions-respondent refused to release petitioner's children for the specific reason that he intended to take them to a foreign country—the avowed motive behind the refusal being that the particular country to which petitioner desired to take these children was objectionable to them on political and religious grounds. The

orders of the Supreme Court of the State of New York, affirmed by the decision of its Court of Appeals sought to be reviewed, remanded the children to the custody of the institutions-respondent for the same reason. In the course of the hearing in the Supreme Court the institutions-respondent put forward the additional ground for their refusal to release the children to their father that taking these children to a foreign country would endanger their American citizenship; and this contention, too, was sustained by the orders of the Supreme Court remanding the children to the custody of the institutions-respondent and by the decisions of the Court of Appeals sought to be reviewed.

We respectfully submit that the action of the institutions-respondent, claiming to derive their authority from the State of New York, and the decision of the New York courts sustaining the same, was in a field in which it is entirely beyond the competency of the State to act, through any of its agencies or departments, for the following reasons:

1. That the foreign relations of the United States are within the exclusive domain of the Federal government and therefore beyond the reach of State powers.

2. That, aside from the fact that the field of foreign relations is the exclusive domain of the Federal government, the States are incompetent to act in anything that lies beyond their territorial borders, such as the care, maintenance and education of minor children in a foreign land or another State.

3. That the protection of United States citizenship is a matter exclusively within the competence of the Federal government and no State has any right to act with respect thereto through any of its departments or agencies.

All of this irrespective of the motives which lay behind the action of the institutions-respondent and the New York courts in attempting to act in this field. As will be shown in another part of this brief, those motives run afoul of

constitutional guarantees and rights protected by acts of Congress and treaties of the United States Government. But at this place we desire to point out that the decision sought to be reviewed is "unconstitutional" in the general sense, quite irrespective of the specific constitutional objections discussed in later portions of this brief.

POINT I

The domain of foreign relations is exclusive in the United States by virtue of their existence as a sovereign nation, and is not dependent on any specific provision of the United States Constitution.

It is respectfully submitted that the regulation of admission of foreigners into the United States and departure of persons therefrom is part of the foreign relations of the United States. These regulations are therefore the exclusive domain of the Federal government and do not depend upon any specific provisions of the United States Constitution.

Chy Lung v. *Freeman,* 92 U. S. 550;
U. S. v. *Curtiss-Wright Export Corp.,* 299 U. S. 304;
U. S. v. *Belmont,* 301 U. S. 324;
Hines v. *Davidowitz,* 312 U. S. 52;
U. S. v. *Pink,* 315 U. S. 203.

The first case cited involved a statute of the State of California which sought to restrict the immigration into the State from foreign parts of "lewd or debauched women". In holding the statute unconstitutional, this Court said:

> "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States * * *; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the *National Government.* If it be otherwise, a

single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *

Chy Lung v. *Freeman,* 92 U. S. 550, 552.

It should be borne in mind that this was a case dealing with a person seeking *entry* into the State of California. The person sought to be excluded would, therefore, immediately upon such entry become a part of the population of the State, subject to its police power. Nevertheless this Court held that the *entry* of such persons cannot be regulated by the State since that is part of the foreign relations of the United States and is therefore within the exclusive domain of the Federal government. *A fortiori* does this exclusiveness of competency of the Federal government apply to a case of *departure* from the United States which removes the departing persons from the police power of the State.

The second case cited involved certain questions which will have to be considered in another connection in this brief as bearing upon the subject of the efficacy of the exchange of notes between the Government of the United States and the Government of the U. S. S. R. under which the petitioner sought to emigrate with his children to Soviet Armenia. At this point we desire only to quote that portion of the opinion of this Court which clearly marks out the subject of foreign relations as the exclusive domain of the Federal government irrespective of any specific provisions of our present Constitution. Said this Court:

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

"The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise

* Emphasis supplied throughout unless otherwise stated.

no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U. S. 238, 294, 80 L. ed. 1160, 1180, 56 S. Ct. 855. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United [not the several] Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'

"As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the Colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."

U. S. v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315-316.

* * * * * *

"The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise."

U. S. v. *Curtiss-Wright,* supra, p. 317.

"It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to *maintain diplomatic relations with other sovereignties,* if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality."

U. S. v. *Curtiss-Wright,* supra, p. 318.

It is unnecessary at this point to discuss here or quote from the other cases cited above, particularly since they will have to be considered in further detail in connection with the question of the rights of the petitioner under the specific provisions of the United States Constitution being the subject of treaties within the exclusive domain of the United States. Suffice it to say here that they all emphasize the fact that no State may, under any pretext whatsoever, legislate or act in any manner *affecting the foreign relations of the United States and that the so-called police power of the States does not extend to that domain.*

POINT II

The police power of the State does not extend beyond its territorial boundaries.

We respectfully submit that quite aside from the fact that the decision sought to be reviewed is an attempt by the State of New York to act in the field of foreign relations which is the exclusive domain of the Federal government, the decision is "unconstitutional" in the broader sense in that it attempts to extend its power beyond its territorial jurisdiction. It is elementary that the power of a State does not extend beyond its boundaries and that its so-called police power is not different in this respect from any other of its powers. The reason is obvious: the so-called police

power is the result of its duty to protect the good order of the community and to provide for the safety, health, morals and welfare of its inhabitants. That this source of its power is also its limitation is settled by the decisions of this Court:

> "*It* (i.e. the Police Power) *springs from the obligation of the state to protect its citizens and provide for the safety and good order of society.* Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of *self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.*"
>
> *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, 622.

Clearly, the State of New York would have neither obligations nor powers with respect to the Choolokian children after they should have been removed from its boundaries under the arrangement between the United States Government and the Government of the U. S. S. R. The detention of these children because of any alleged interest of the State of New York in their welfare while in Soviet Armenia is therefore clearly beyond the power of the State or any of its agencies or departments. Such "interest" can be no more—nor any more efficacious—than the abstract interest which the people of the State of New York may have generally in the condition of the people of Soviet Armenia or of any other foreign country—an "interest" which clearly does not give the State of New York any right, for that reason, to interfere with or regulate such conditions. As already pointed out, and as this Court has repeatedly stated, the concern of the people of New York in any such matters does not form a special interest which the State may protect, but merely an interest which the people of the State of New York have in common with the rest of the people of the United States, and can therefore be protected, if at all, only by the United States Government. The State

of New York would, therefore, have no power to prevent the departure of petitioner, and the taking with him of his children, even if such departure were not pursuant to an arrangement and compact made by the United States with the Government of the U. S. S. R. Certainly, it cannot do so in the present instance, when the attempt by petitioner to take his children with him to Armenia was in pursuance to a compact between the United States Government and the Government of the U. S. S. R., which the decision sought to be reviewed clearly contravenes and attempts to nullify.

POINT III

American citizenship is within the exclusive protection of the United States, and the several states can neither detract from nor add to that protection.

Since the United States is the only strictly sovereign power in this country, to the exclusion of the several States, it follows of necessity that the protection of American citizenship lies within the exclusive domain of the Federal government—that government being the only one capable and competent to act in our foreign relations, of which the protection of American citizenship outside the boundaries of the United States is of necessity a part. Clearly, if the State of New York attempted to "protect" the citizenship of the Choolokian children after they had left the United States such attempt would be a flagrant interference with the foreign relations of the United States. It is no less an interference with the foreign relations of the United States because the interference took the form of preventing their departure from the United States.

In this connection we must bear in mind that, strictly speaking, there is no such thing as State citizenship—notwithstanding the fact that we usually speak of our *dual* citizenship. While the Fourteenth Amendment speaks of our being citizens of the United States and of the States

wherein we reside, the State has no authority over our citizenship—*it can neither give it nor take it away.* That citizenship is given to us either by the Constitution of the United States—in the case of natural born citizens—or by laws of the United States made in pursuance to the United States Constitution. In so far as there is any State citizenship at all, it is derived from our national citizenship and is wholly subordinate to it. We can also shake it, without depriving ourselves of our United States citizenship, by removing permanently from the State of which we are citizens into another State, or into the District of Columbia, or a United States territory, or any one of the United States possessions.

That United States citizenship is primary and State citizenship is derivative has been definitely settled by the adoption of the Fourteenth Amendment.

> *Arver* v. *United States,* 245 U. S. 366;
> *Colgate* v. *Harvey,* 296 U. S. 404.

In the last case cited this Court said:

> "Thus the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And *while* the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship. 'In reviewing the subject', Chief Justice White said in the Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 377, 388, 389, 62 L. ed. 352, 353, 357, 358, 38 S. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, 'we have hitherto considered it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that [the Fourteenth] Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the Government under the Constitution by causing

citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest."

Colgate v. *Harvey,* 296 U. S. 427.

The State of New York, therefore, had no citizenship of its own to protect; and the United States citizenship of the Choolokian children was clearly within the exclusive protection of the United States. And as we shall see further below, the United States has specifically dealt with the subject and has given the Choolokian children all the protection of their American citizenship which Congress, in its wisdom, thought necessary. It should only be added that under well settled doctrine the States can neither detract from nor add to the "protection" of any subject, or matter, the regulation or protection of which is within the exclusive jurisdiction of the United States; nor detract from or add to such protection in a matter which might otherwise be within the legislative competency of a State but for the action of Congress in legislating upon the same. The first of these propositions is so self-evident that the subject has only seldom come before this Court in recent years. The second proposition is no less self-evident, and the large volume of litigation on the subject turned entirely on the question of whether or not Congress had actually intended to "occupy the field". Of the numerous cases on this branch of the law it is sufficient to cite the following:

Houston v. *Moore,* 5 Wheat. 1;
Hines v. *Davidowitz,* 312 U. S. 52;
Cloverleaf Butter Co. v. *Patterson,* 315 U. S. 148;
Northern Pacific Railway v. *Washington,* 222 U. S. 370.

The basic doctrine was well stated by Mr. Justice Washington in the earliest of these cases when he said in delivering the judgment of the Court:

> "In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other."
>
> *Houston* v. *Moore,* 5 Wheat. 1, 23.

It is clear that in a case where, under the Constitution, two wills are competent, it is the *superior* will that must prevail whenever the same has been expressed; and that where the subject is within the exclusive jurisdiction of one will, *only that will can be heard at all.* And it is equally clear that the present case belongs in the latter field.*

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* We have quoted in the petition the issue as tendered by the institutions-respondent in their returns, the essence of which is that the "petitioner seeks to take such children and each of them into a foreign country presently operating under a system of law and education wholly different from the system of law and education in force in the United States of America and in the State of New York". The opinion of the Supreme Court, at Special Term, commences with the following statement:

> "The relator * * * asserts his right to have these children returned to him for the purpose of taking them to Soviet Armenia" (fol. 1157).

It then states that:

> "The question presented is whether the Court can here make the determination that the interest of these children will be promoted by giving the father custody for the purpose of taking the children to Soviet Armenia, and that the father is fit, competent and able duly to maintain, support and educate the children in Soviet Armenia" (fol. 1161).

The Court then stated two reasons for its decision to remand the children to the institutions-respondent:

(1) That petitioner would be unable properly to take care of the children in Soviet Armenia; and

(2) That the American citizenship of the children would be jeopardized by their being taken to that country.

The substance of the first ground is contained in the following language of the Court:

"It does not appear what the father would do in Soviet Armenia to earn a living and what kind of a living it would be. * * * There is nothing in the Record to support the assertion in the letter of the Secretary of the Soviet Consulate that an adequate plan has been made for the care of the children in Armenia by their parents or their relatives. The statements in the letter of October 31 are therefore not supported by any facts or by the kind of knowledge or information to which this court can give any weight.

"Clearly this is not a sufficient showing to justify this court in finding as required by the Social Welfare Law that the father is 'fit, competent and able to duly maintain, support and educate' these three children in Soviet Armenia" (fols. 1186-1188).

It should be noted here that there was never any question raised as to the father's fitness which we take to refer to moral fitness; nor to his competence, which we take to refer to mental competence. Indeed, at least as far as the first question is concerned the Record affirmatively shows the father's moral fitness as well as his solicitude for the welfare of his children. In support of the other ground of the decision,—namely the danger of the children's American citizenship,—the Court sai

"If the father were permitted in this case to take these three infant children to Soviet Armenia, it seems clear under present conditions that their right to avail themselves of the privileges of their American citizenship might be forever lost. It is unthinkable that an American court could permit this father to place his infant children in such an irretrievable position. While he may make that choice for himself, it will certainly not promote the best interests of the children, as this court is required to find by Section 383 of the Social Welfare Law, to permit the father or anyone to dissipate beyond redemption these priceless rights of the children. The exercise of these rights should not be left to the remote chance that they might some day before their twenty-third birthday be able to escape from Armenia and return to the United States" (fol. 1170).

B

THE DECISION SOUGHT TO BE REVIEWED DEPRIVES PETITIONER OF THE RIGHT OF EXPATRIATION GUARANTEED TO HIM BY THE FUNDAMENTAL LAW AND ACTS OF CONGRESS; AND OF RIGHTS DERIVED FROM A TREATY OF THE UNITED STATES AND PROTECTED BY ITS PUBLIC POLICY

We respectfully submit that the decision sought to be reviewed deprives the petitioner of his natural and fundamental right of expatriation guaranteed by the Ninth Amendment to the United States Constitution; contravenes the specific provisions of Sections 800 and 807 of Title 8 of the U. S. C. A.; and denies to him rights guaranteed to him in a treaty of the United States and its declared public policy.

POINT IV

The right of expatriation is a fundamental right implicit in Article I, Section 8, Clause 4 of the United States Constitution and is guaranteed by the Ninth Amendment to the United States Constitution.

We respectfully submit that the right of expatriation is one of those natural and inalienable rights which is part of the fundamental law of the United States. It is implicitly recognized by the 4th Clause of Section 8 of Article I of the United States Constitution which gives to Congress the right to "establish an uniform rule of naturalization". The framers of our Constitution did not intend to arrogate to the Government of the United States a privilege which they did not believe was a natural right of all people. Such an arrogation of privileges was not the purpose of our Constitution; nor was it within its spirit. The framers,

recognizing the natural right of expatriation, merely intended that the regulation of admissions to American citizenship of expatriates from other lands should belong to the United States rather than the several States. The right of any citizen of the United States to leave any State and go elsewhere was recognized and considered as absolutely free, attaching to United States citizenship, and therefore beyond the regulative power of any of the States.

Slaughterhouse Cases, 16 Wall. 36;
Williams v. *Fears,* 179 U. S. 270.

This fundamental right is therefore one of the rights protected against denial or "disparagement" by the Ninth Amendment to the United States Constitution. That such is the case was recognized by this Court from the earliest days of its existence, although Congress had not acted upon it affirmatively until the year 1868. In the very early case of *Talbot* v. *Janson,* 3 Dall. 133, Mr. Justice Iredell, a member of the original Court appointed by President Washington, took occasion to affirm the doctrine, although the case before the Court did not call for it. In the course of his opinion in that case Mr. Justice Iredell said:

> "This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject. That a man * * * should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, * * * are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize."

Talbot v. *Janson,* 3 Dall. 133, 161-162.

And whenever an occasion called for action by the executive department, that department acted in recognition

of that right. It is unnecessary to recite here the actions of the executive department prior to 1868, since in that year the right was recognized in an executive action participated in by the United States Senate—namely, the treaty with China of July 28, 1868. One of the articles of that Treaty read in part:

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance."

See:

Chae Chan Ping v. *U. S.*, 130 U. S. 581.

On the day preceding the date of this treaty—July 27, 1868—Congress confirmed this right, recognizing its fundamental character, by Joint Resolution which has since been embodied in the Nationality Code (U. S. C. A., Title 8, Sec. 800).

POINT V

The right of expatriation is recognized by the Nationality Code and is regulated by its provisions.

Section 800 of the Nationality Code (Title 8, U. S. C. A.) reads in part as follows:

> "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness, * * * Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, *is declared inconsistent with the fundamental principles of the Republic.*"

Section 807 of the Nationality Code reads in part as follows:

> "A person having American nationality, who is a minor and is residing in a foreign state with or under

> the legal custody of a parent who loses American nationality * * * shall at the same time lose his American nationality if such minor has or acquires the nationality of such foreign state: *Provided,* that, in such case, American nationality shall not be lost as the result of loss of American nationality by the parent unless and until the child attains the age of twenty-three years without having acquired permanent residence in the United States."

This Act of Congress, we respectfully submit, establishes four propositions:

First: That the right of expatriation is part of the fundamental law of the Republic of the United States, which no State can abridge, impede, or otherwise interfere with;

Second: That an American citizen who desires to expatriate has the right to take his minor children with him;

Third: That such minor children become divested of their American citizenship if they acquire the nationality of any foreign State;

Fourth: That such divestment of citizenship of the minors is conditioned not only upon their acquiring a foreign nationality, but also upon their failure to return to the United States, and acquiring a permanent residence therein, before they arrive at the age of twenty-three.

Thus the United States Nationality Code not only contains a guarantee of the right of expatriation to both adults and minors, but also, in the case of the latter, contains provisions which regulate the preservation of the same.

Again we respectfully call the attention of the Court to the fact that this subject is entirely beyond the regulatory sphere of the several States. They could not, therefore, pass any laws, or take any other action, with respect thereto, even if Congress had not specifically legislated on the subject. The right of expatriation and freedom of locomotion being part of the fundamental law of the Republic, the only government under our Constitution which could protect

American citizenship, if protection were required, is the Federal government; and no State could attempt to protect the same, either by way of preventing expatriation or otherwise, even if Congress had never acted upon the subject. But since Congress did act on the subject, it is clear that the several States have no right to act on the subject even if they could so act in the absence of congressional action. Congress having acted both with respect to the expatriation of minors and the protection of their citizenship, the States are utterly incompetent either to detract from or add to that protection.

The Congress of the United States has spoken and said that the provisions of Section 807 of the Nationality Code furnish the only protection required by American-born children of expatriating parents—that they may return to the United States and establish a permanent residence therein before they attain the age of twenty-three, by which action their American citizenship shall become unaffected by their previous expatriation. The only power within the Republic competent to speak in the premises having thus spoken, no State court or any other State agency may say that that protection is insufficient. Certainly, no State can, under the pretext of protecting the minors' American citizenship, deprive them of their fundamental right to become conditionally expatriated in accordance with the will of their parents.

But it is not only the right of the minor children that is here involved—the right of the parents not to have their expatriation impaired or interfered with by depriving them of the custody of the children is similarly involved. The Record in this case shows that petitioner was a loving parent and that he did not leave this country until it was stipulated in the Record that his leaving this country would not in any way affect his right to the custody of his children (fols. 1178, 1181). He had a right to leave this country in the expectation that the right guaranteed by the Constitution and the laws of the United States to him and his children would not be denied. He still expects that right to be granted him by this Court.

POINT VI

The right guaranteed to petitioner and his children by the Constitution and laws of the United States, was also guaranteed by a treaty of the United States, and by its declared public policy.

In view of the specific provisions of the governing statute of the United States, it would seem unnecessary to appeal to any other protection of petitioner's rights and the rights of his children in the premises. However, in view of the action of the highest court of the State of New York, we would consider ourselves remiss in our duty if we did not discuss the other aspects of the case, including the declared policy of the United States and the treaty or compact entered into between it and the Government of the U. S. S. R.—particularly since this case arose as the direct result of that compact.

The public policy of the United States in this respect was officially declared, as already stated, in 1868, both in the act which was embodied in the Nationality Code and in one of the articles of a formal treaty with a foreign power. It has since been reaffirmed by the adhesion of the United States to the Declaration of Human Rights adopted by the United Nations. That declaration reads in part as follows:

"Article 14(2)

Everyone has the right to leave any country, including his own * * *"

"Article 17(3)

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

These two declarations, taken together, make it clear that the right of expatriation of necessity includes the right of expatriating parents to take their children along with them.

Indeed, without such right, the right of expatriation, a right which the Nationality Code declares not only to be "natural and inherent" but also "indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness", would be but an empty right, if not an actual mockery.

This policy of the United States, which was recognized as part of its fundamental law throughout our existence as a nation, now made part of the Declaration of Human Rights by the world organization which this government was largely instrumental in creating, was embodied in a specific compact which, we respectfully submit, has the force of a treaty, between the Government of the United States and the Government of the U. S. S. R. As already stated, this case arose directly as a result of the compact between the two governments embodied in the exchange of notes set forth in the petition. Indeed, the ship upon which petitioner and part of his family left the United States and on which the children involved in this litigation were to sail with him, was provided by the other contracting party to this compact in reliance upon this government complying with its part of the compact, which, among other things, assured the Embassy of the U. S. S. R. "that no difficulties will be experienced by persons of Armenian origin in the United States who desire to emigrate to the Soviet Union".

Needless to say, the deprivation of the right to take one's children along with him while expatriating to another country is one of the greatest *"difficulties"* which could possibly be "experienced".

We respectfully submit that the United States Government having pledged its word that no difficulties would be experienced by the Armenians desiring to take advantage of the compact between our Government and the Government of the U. S. S. R., no State may erect such difficulties, irrespective of the motives which actuated the same or the reasons therefor.

We have already pointed out that one of the reasons assigned by the New York Supreme Court, namely, that petitioner's taking his children with him to Soviet Armenia would endanger their American citizenship, is utterly untenable in view of the Act of Congress governing the subject. It is equally clear that the other ground assigned by that Court, namely, that the compact between our Government and the Government of the U. S. S. R. did not make sufficient provision for the care, maintenance and education of the minors involved herein, is equally untenable, if not more so. As pointed out in an earlier portion of this brief, it is not the duty of any State to provide for the care, maintenance and education of any children born within its jurisdiction after they have left that jurisdiction, nor is it within its competency to require any protection for such care, maintenance or education after such children have gone beyond its boundaries. This is particularly the case where their departure is for a foreign country and the protection of their rights, if such be needed, becomes the exclusive concern of the United States Government.

It so happens that in this case, as the Record shows, there actually was provision made for the care and maintenance of the children involved here, along with the many other adults and children who sailed on the SS. Rossia on November 1, 1947, or who would sail thereafter under the terms of the compact. It also so happens that in addition to the provisions made in the general plan referred to in the Record, the foreign power involved, the Government of the U. S. S. R., has executed a special guarantee for the proper care, maintenance and education of petitioner's children. We respectfully submit that the rights of the petitioner and his children did not depend on the sufficiency of that guarantee, for the State of New York had no right to exact such guarantee from the Government of the U. S. S. R. But there it was, a fact showing the great interest taken by the Government of the U. S. S. R. in the matter, which was equalled by the interest of the United States as shown by the fact that it has waived all passport requirements

for those sailing on the SS. Rossia in pursuance to the compact embodied in the exchange of notes. The State of New York clearly had no right or power to pass upon the sufficiency of the guarantee. And it is additional proof of the danger of permitting State interference in such delicate matters of diplomacy and foreign relations as are here involved that the Justice of the New York Supreme Court in passing on this question—as also when he passed on the question of the alleged danger to the American citizenship of the children involved in this case—used intemperate language, language clearly calculated to exacerbate the relations between the Government of the United States and the Government of the U. S. S. R. which the exchange of notes sought to improve.

That a compact or agreement between our Government and a foreign power, such as is involved in this case, is a treaty within the meaning of Article VI of the Constitution making treaties of the United States the supreme law of the land, is settled by the decisions of this Court:

U. S. v. *Curtiss-Wright Export Co.*, 299 U. S. 304;
U. S. v. *Belmont*, 301 U. S. 324;
U. S. v. *Pink*, 315 U. S. 203.

The first case cited involved the validity of an indictment for an alleged violation of the terms of a proclamation issued by the President of the United States in pursuance to a Joint Resolution of Congress prohibiting the sale of arms or munitions to the belligerents of the so-called Chaco War. The indictment was dismissed by the District Court on the ground that neither the Joint Resolution nor the proclamation, nor the two together, constituted a law of the United States, since they constituted neither a statute nor a treaty. This Court reversed the judgment of the Court below, holding that the proclamation in question was a law of the United States, having the force of a treaty even though not a formal treaty concluded in accordance with the provisions of the treaty-making power of the

United States. In the course of its opinion in that case this Court said:

> "The power to make such international agreements as do not constitute treaties in the constitutional sense * * * exist as inherently inseparable from the conception of nationality."
>
> *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318.

The second case cited involved an exchange of notes such as is involved in this case between the same two powers herein, commonly referred to as the Litvinoff Agreement. The United States brought suit in the U. S. District Court for the Southern District of New York to recover a fund deposited with a private banker, a citizen of the State of New York, claimed to have been assigned to it by the informal note executed by the representative of the U. S. S. R. The District Court dismissed the complaint on the ground that the exchange of notes did not constitute a treaty and that the fund claimed to be assigned by the Government of the U. S. S. R. to the United States had been illegally confiscated by the first named government and it was therefore contrary to the policy of the State of New York to make any judgment which would give efficacy to such confiscation. This Court reversed, holding that the exchange of notes constituted a compact between the United States and the Government of the U. S. S. R. having the force of a treaty which could not be thwarted by the policy of the State of New York. In the course of its opinion in that case this Court said:

> "We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved."

And in speaking of compacts as distinguished from formal treaties, but nevertheless constituting the supreme law of the land, this Court said:

> "There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations."
>
> *U. S.* v. *Belmont,* 301 U. S. 324, 327, 330.

The third case cited was also an action by the United States to recover a fund based on the so-called Litvinoff Agreement. This fund was in the hands of the Superintendent of Insurance of the State of New York and the action was brought in the Supreme Court of that State. The Supreme Court of the State of New York gave judgment in favor of the defendant and the judgment was affirmed by the Appellate Division and the Court of Appeals. The reasons assigned by the courts of the State of New York for their decisions were the same as those of the United States District Court in the *Belmont* case, except that the New York courts added that to give effect to the confiscatory decree of the Russian Government would be contrary not only to the policy of the State of New York but also to the policy of the United States. This Court reversed the judgments of the New York State courts for the same reasons that led to the reversal of the decision of the District Court in the *Belmont* case. In its opinion in the later case this Court quoted from the *Belmont* case the passages quoted by us above and then added:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. 6, Cl. 2) of the Constitution. *Such international compacts and agreements as the Litvinof Assignment have a similar dignity.*"
>
> *U. S.* v. *Pink,* 315 U. S. 203, 230.

C

THE DECISION SOUGHT TO BE REVIEWED VIOLATES PETITIONER'S NATURAL AND CONSTITUTIONAL RIGHTS TO THE CUSTODY, CARE AND EDUCATION OF HIS CHILDREN; AND OFFENDS THE PROVISIONS OF THE FIRST, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The foregoing discussion proceeded from the nature of the distribution of powers under our Constitution between the Federal and State governments,—the argument being that the State of New York was incompetent to act in the premises in any manner whatsoever. The reasons or motives which actuated the State functionaries, and the *manner* in which they acted, was therefore immaterial to the argument. We now turn to another aspect of the case,—an aspect in which the *manner* in which the State of New York acted, and the reasons and motives from which it acted, become material. The argument in this portion of the brief will assume that the State was competent to act under its police power; and the argument will proceed not from the distribution of powers between the Federal and State governments, but from the limitations placed upon governmental action, Federal and State alike, by the provisions of the United States Constitution, express or implied.

A reading of the Record herein will demonstrate beyond peradventure of a doubt that the action of the institutions-respondent, in refusing to release petitioner's minor children, sanctioned by the New York courts in dismissing the writs of habeas corpus and remanding the children to the custody of the institutions-respondent, was the result of a desire to impose upon petitioner and his children certain political tenets and a particular form of religion. In order not to extend this brief unduly, we shall point here only to some of the significant facts in the Record.

In the first place, we again call the attention of this Court to the issue as joined by the returns to the writs of habeas corpus. The salient point of these returns is contained in the statement that a release of the children to their father would result in their being brought up "under a system of law and education wholly different from the system of law and education in force in the United States of America."

We next come to the hearing upon the issue thus joined, only to find that the refusal to release the children to their natural and constitutional guardian, was based not only on a desire to rear them in accordance with certain political tenets, but also to impose upon them a religious education,—nay, a particular religious faith. This religious *motif* appears throughout the cross-examination by counsel for the institutions-respondent of the witnesses produced by petitioner, as well as in the testimony adduced on behalf of the institutions-respondent themselves. It is sufficient to point here to the close questioning of petitioner's witnesses by counsel for the institutions-respondent as to whether any religious education had been provided for these children in Soviet Armenia, and what kind of a religious education they would receive there,—including the question as to whether or not there was a Roman Catholic Church in the city to which the children were being taken (fols. 238, 243, 294-296, 297, 301, 373-376, 602-622, 630, 632, 702-709, 723-736, 915). This was followed by evidence introduced by the institutions-respondent of the fact that the children had been baptized in the Roman Catholic Church (fols. 803, 870). Counsel for the petitioner rightfully objected to this whole line of testimony on the ground that the same was irrelevant to the issues of the case, but was overruled by the Court,—the Court thus holding in effect that the fact that the children had been baptized in a certain religious faith, and that their release to the father would result in their being brought up in a different religious faith, was the concern of the State of New York.

And the whole matter was clinched by counsel for the institutions-respondent in a motion to dismiss the writs, at the close of the hearing, on the ground that—

> "• • • *it appears affirmatively that the last religion officially designated by the father of the children for them to the Department of Public Welfare of the City of New York, was the Roman Catholic religion, and that there is no evidence that any facilities for the practice of said religion will be available to the said children in Soviet Armenia*" (fol. 1091).

Thus the Record clearly demonstrates that the real motive behind the decision sought to be reviewed, if not its avowed reason, is the fact that a release of the children to the custody of their father would result in their being brought up in accordance with political tenets and religious beliefs disapproved of by the institutions-respondent generally, and by the State of New York in this case.

POINT VII

The decision sought to be reviewed is violative of the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

Before proceeding to discuss the larger aspects of religious freedom and personal liberty involved in the decision sought to be reviewed, we desire to call attention to a subsidiary question, which does not loom large in this case because of the much larger issues presented by it, but which serves to point up those issues.

The Court will recall that petitioner voluntarily placed his children in the custody of the Department of Welfare of the City of New York because his wife had become mentally ill and had been committed to a State institution for the mentally ill. The Court will also recall that petitioner's wife had been released by the New York

State institution for the mentally ill on November 1, 1947, so that she could accompany her husband to Soviet Armenia, although she had not yet been cured of her ailment. We now desire to call the attention of the Court to the fact that, under the laws of the State of New York, the provisions for the release of the mentally ill are substantially the same as those for the release of minor children who are in the legal custody of State institutions. The statute invoked by the New York courts for their decision to remand the petitioner's children to the custody of the institutions-respondent, provides that the releasing authority must be satisfied that the

> "interest of said child will be promoted thereby and that such parent is fit, competent and duly able to maintain, support and educate such child."
>
> (Social Welfare Law, Sec. 383.)

The law governing the release of mentally ill patients from a State institution provides that the releasing authority must be satisfied,

> "by sufficient proof that friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge."
>
> (Mental Hygiene Law, Sec. 87.)

Before petitioner's wife could be released from the Kings Park Hospital, it was therefore incumbent upon the Commissioner of Mental Hygiene to determine that provision had been made for the proper care and maintenance of petitioner's wife. Petitioner clearly was in no better position to take care of his mentally ill wife than he was of his minor children. And yet the decision of the State of New York was different in the case of the wife than that of the children. There could be only one explanation for the different treatment given by the State of New York to petitioner's wife on the one hand and to his children on the other,—namely, that no question of

political or religious education was involved in the case of the wife but was involved in the case of the children. This, we respectfully submit, offends against the equal protection of the laws of the Fourteenth Amendment. And, in any event, it points to the real motive behind the decision sought to be reviewed.

POINT VIII

The right of parents to control the secular and religious education of their children is a fundamental right guaranteed by the Constitution of the United States.

We respectfully submit that the decision sought to be reviewed invades petitioner's fundamental right to control the secular and religious education of his three children involved in this litigation, which right is guaranteed to him by the Constitution of the United States.

As already stated, in this part of the brief we treat the problem as if it did not involve the foreign relations of the United States, or the right of expatriation under the statutes of the United States, and that the State would therefore have some rights with respect to the education of petitioner's children under its general police power. The argument here is that the police power of the State with respect to the education of children is limited within narrow confines by the United States Constitution and the several amendments thereto. One of the limitations upon the power of the State in this regard is that it may not interfere with the fundamental right of parents to the control of the secular and religious education of their children.

Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters of Holy Names*, 268 U. S. 510.

In the second case cited, this Court said with respect to the general right of parents to control the education of their children:

> "The child is not the mere creature of the state; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*"

And referring to the doctrine laid down in the earlier case with respect to the limitation placed by the Constitution upon the power of the State in this field, this Court said:

> "Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 37 L. ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."
>
> *Pierce* v. *Society of Sisters of Holy Names,* 268 U. S. 510, 534, 535.

POINT IX

The First and Fourteenth Amendments prohibit a State from using its police power so as to interfere with the fundamental right of parents to control the secular and religious education of their children by imposing its own standards.

It is settled by the decisions of this Court that the secular and religious freedoms guaranteed by the First Amendment, now made operative against the States through the Fourteenth Amendment, forbid a state to interfere with the right of parents to control the secular and religious education of their children by providing its own standards in that respect. In the *Pierce* case, this Court

said, in a passage immediately following the passage last quoted:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

And in *Meyer* v. *Nebraska* this Court said:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (Citing cases.) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."
>
> *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

And in recent decisions this Court has emphasized the fact that a State may do nothing which even remotely interferes with the absolute right of a parent to control the secular and religious education of his children.

> *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624;
>
> *McCollum* v. *Board of Education,* 333 U. S. 203.

It is unnecessary here to rehearse the facts in these cases or to quote from the opinions rendered therein. We merely desire to point here to the fact that in both of these cases

the right of the parent to control the secular or religious education of the children is taken for granted. Both of these cases involved children of public school age who were merely following the directions of their parents, and it was the parents that invoked the constitutional protection of their ideas which they desired to implant into their children,—in the first case involving sectarian religious scruples, and in the second case objection to any kind of religious instruction to the child because of the parents' non-belief.

POINT X

The decision sought to be reviewed imposes upon petitioner and his children cruel and unusual punishment contrary to the provisions of the Eighth Amendment to the United States Constitution.

It need hardly be argued that the right of a parent to the custody of his children, and the right of children to parental care, are fundamental rights protected by the United States Constitution. A parent may not therefore be deprived of the custody of his children, nor children deprived of parental care, except in pursuance to an overriding *public purpose.*

That the desire of a State to impose upon children a particular mode of political thought, or to rear them in accordance with its views on religion, is not such a public purpose under our Constitution is self-evident. The decision sought to be reviewed is therefore not only violative of the specific provisions of the First and Fourteenth Amendments, and of basic rights protected against disparagement by the Ninth Amendment, but also of the provisions contained in the Eighth Amendment against cruel and unusual punishment.

> "But can persons expelled be subjected to 'cruel and unsual punishment' in the process of expulsion, as would be the case if children born in this country

were separated from them on their departure because citizens of the United States?"

U. S. v. *Wong Kim Ark,* 169 U. S. 649, 729.

It is true that the provision against cruel and unusual punishment is contained in that amendment in a context indicating that the primary purpose was to prevent cruel and unusual punishment in criminal cases. But, clearly, what cannot be done as punishment in a criminal case cannot be done to persons guilty of no offense whatever. And the language just quoted clearly shows that the prohibition is a general one. Furthermore, this Court has repeatedly held that constitutional prohibitions couched in language which traditionally has reference only to criminal cases, have wider import in our Constitution. Such, for instance, are the prohibitions against bills of attainder and *ex post facto* laws. Both of these terms have traditionally been applied only to criminal cases. Nevertheless, this Court has repeatedly held that they apply whenever injury is inflicted, even though that is done by civil process instead of criminal prosecution.

Ex parte Garland, 4 Wall. 333;
Pierce v. *Corskadon,* 16 Wall. 234;
U. S. v. *Lovett,* 328 U. S. 303.

CONCLUSION

We respectfully submit that three things are clear from the foregoing:

1. That by the decision sought to be reviewed the State of New York intruded into a Federal domain from which the several States are completely excluded.

2. That the decision sought to be reviewed is an exercise of power by the State of New York violative of the provisions of the United States Constitution and the several articles of amendment thereto.

3. That the subject matter involved is of the greatest public importance, affecting as it does directly the civil and religious liberties of a large section of our population, and indirectly those of every citizen and inhabitant of this country.

This is therefore a case eminently proper for review by this Court. The writ of *certiorari* prayed for should accordingly be granted by this Court so that a full argument of the important constitutional questions raised may be had, and judgment directed by this Court in accordance with its interpretation of the constitutional rights involved.

Dated: New York, January 10, 1950.

Respectfully submitted,

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Borough of Manhattan,
City of New York.

No. [illegible]

[illegible] of the State of New York, ex rel.
Hamparsoum Chooklikian,

Petitioner,

against

[illegible] of the Immigration Service and John J. [illegible], executive director, who is the person in charge [illegible] having custody of the detained infants hereinafter named, and Raymond M. Hilliard, as Commissioner [illegible] Department of Welfare of the City of New York,

Respondents.

The People of the State of New York, ex rel.
Hamparsoum Chooklikian,

Petitioner,

against

The New York Foundling Hospital and Sister Mary [illegible], superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and Raymond M. Hilliard, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

PETITIONER'S REPLY BRIEF

The brief submitted by the institutions-respondent barely touches upon the important constitutional questions involved in this case. It deals mainly with extraneous matters hardly relevant to the constitutional problems, clearly intended to befog the real issues in this case. It also misrepresents the facts of the case. It is impossible for us to

refer to all of the untrue or misleading statements contained in the brief, but we feel constrained to refer to some of them, since a failure to do so might place the case out of focus. We shall, however, do our best to be brief.

I

The public importance of the case.

Throughout their brief as well as in the enumeration of points in the section labeled "Conclusion", counsel endeavor to present the case as if it were merely a private litigation between Mr. Choolokian on the one hand and the institutions on the other over the question as to who is to bring up petitioner's three minor children,—a matter in which the public is hardly concerned and involving no constitutional questions and, in this connection, counsel even made the bold statement that the constitutional questions were never adverted to in the trial court but was an "afterthought". In itself this would hardly be of any importance, since under the rules of this Court it is sufficient that the questions were raised in the State Courts during any stage of the proceeding; and the undeniable fact is that the questions were raised in the Court of Appeals as that Court has specifically certified (R. 444-5). However, the question is of importance as showing the public interest in the case. The great public interest which the case aroused, and which could only be due to the constitutional issues involved, showed itself at the very commencement of the litigation as evidenced by the fact that two religious bodies as well as the American Civil Liberties Union have participated in the trial at Special Term. This interest was, of course, maintained throughout. The official report of the case in the Court of Appeals shows that both the religious institutions as well as the American Civil Liberties Union filed briefs in that court (300 N. Y. 43). And Mr. Charles G. Coster, one of the counsel who signs the brief in this court, filed an affidavit in the Appellate Division of the

New York Supreme Court, verified February 14, 1948, in which he stated that while the case was on trial before Mr. Justice Lumbard, counsel for the American Civil Liberties Union "threatened" to take the case to this Court, if necessary,—which would be nonsense if the constitutional questions had not been raised in that court. In his said affidavit Mr. Coster averred:

> "If, therefore, the Soviet Consulate or any one of the amici curiae, to wit, the American Civil Liberties Union, the Human Relations Commission of the Protestant Council of the City of New York, or the American Apostolic Orthodox Church, Diocese of the Armenian Church in North America, desired to appeal herein, there is no reason why they should seek to do so at public expense or at the expense of the respondent institutions. Counsel for the American Civil Liberties Union told deponent, at the trial before Mr. Justice Lumbard, and before the trial was even completed, that unless deponent changed the legal position of his client to conform to the suggestions of said counsel for the American Civil Liberties Union, it would appeal to the Supreme Court of the United States."

And he added:

> *"The issues in this case are important not only to the Respondent institutions, but to every American citizen and every American institution."* (Emphasis supplied.)

The public importance of this case is also attested by the fact that very recently the American Church Committee for Armenia published a long pamphlet dealing with this case, entitled "The Case of the Choolokian Family—A New Phase in the History of the Struggle for Religious Freedom in America", the first three paragraphs of which read as follows:

> "A new chapter in the history of the struggle for religious liberty is being written today around the person of a humble Armenian shoemaker named Hamportzoon Choolokian and his efforts to regain custody of his three children, detained by two Roman Catholic institutions in New York. While the legal

suits incited by these institutions have been pending in the courts, the children have been systematically indoctrinated in the faith of the Catholic Church, against the expressed wishes of their father, who is not and never has been a Roman Catholic.

Here is a case in which the paramount natural right of the parent to his children is being flouted by the very Church which so aggressively has maintained the doctrine of parental rights to justify the establishment of the parochial school system in America.

The Roman Catholic Church reserves to itself the right to determine the type of education, secular and religious, the children of Catholic parents should receive. Canon 1374 of the Church reads: 'Catholic children must not attend non-Catholic, neutral, or mixed schools, that is, such as are also open to non-Catholics. It is for the local Ordinary (Bishop) alone to decide, according to the instructions of the Apostolic See in what circumstances and with what precautions attendance at such schools may be tolerated, without danger or perversion to the pupils.'"

The concluding paragraph of this pamphlet reads as follows:

> "All true Americans will unite to keep intact the sacred rights of the family and the principle of the separation of church and state, and will not abandon the Choolokian family to its present fate. They will see to it that the Choolokian children are liberated from the institutions which have virtually imprisoned them, and returned to the love and warmth which only their parents can give."

The pamphlet also states that a committee had been formed under the name of "National Committee for the Rights of the Choolokian Family", which includes among its members the following religious and civic leaders: Glen L. Archer, Washington, D. C.; Algernon D. Black, leader, Society for Ethical Culture; Dean Harold A. Bosley, Divinity School, Duke University; Dr. Lewis B. Carpenter, president, National College for Christian Workers; Dr. Samuel McCrae Cavert, general secretary, Federal Council of the Churches

of Christ in America; Professor Lawson P. Chambers, Washington University; Dr. Robert Cummins, superintendent, Universalist Church in America; Dr. Frederick L. Fagley, secretary emeritus, Congregational Christian Churches of America; Dr. John W. Harms, executive vice-president, Church Federation of Greater Chicago; Dr. Henry Smith Leiper; Professor Emil Lengyel, New York University; Judge Leslie J. Lyons, Kansas City, Mo.; Rt. Rev. Norman B. Nash, bishop of the Diocese of Massachusetts; Professor Reinhold Niebuhr, Union Theological Seminary; Bishop G. Bromley Oxnam, the Methodist Church, New York City; Rev. Edward Pruden, First Baptist Church, Washington, D. C.; Dr. Frederick Reissig, executive secretary, Washington Federation of Churches, Washington, D. C.; Dr. Robert W. Searle, Protestant Council of New York; Rev. Donald Timmerman, executive secretary, Franklin County Council of Churches, Columbia, Ohio; Rt. Rev. Bishop Tiran, prelate of the Armenian Church in North America; Bishop Raymond J. Wade, Bay View, Michigan; Dr. Carl Hermann Voss, American Christian Palestine Committee.

The pamphlet also contains a bibliography of articles which appeared in public print, listing 44 items during the period commencing from November 2, 1947 to December 15, 1949, and including publications as far as the Pacific Coast. We may add that this bibliography is incomplete to our knowledge.

II

"The interest of the children."

In their effort to evade the real issue in the case counsel for the institutions-respondent repeatedly assert that the only concern of the institutions-respondent is "the interest of the children",—thus, casting a slur upon the great religious bodies who have interested themselves on behalf of petitioner, as if they were unmindful of those interests.

Needless to say, the religious bodies who have interceded on behalf of petitioner and his children are at least as mindful of the interests of these children as are the institutions-respondent. But in addition, they are also mindful of the grave constitutional questions involved in this case,—a discussion of which the institutions-respondent sedulously avoid. The reason is obvious: the Constitution of the United States as interpreted by this Court, confides the interest of minor children to their parents. It is true, of course, that the right of the parents to take care of the material and moral well-being of their children is not absolute,—any more than are the rights of life, liberty or property.

Under certain conditions all of these rights may be forfeited; but the action of the State in all such matters is subject to the supervision of this Court in order to insure that the so-called Police Power of the State will not be exercised in violation of the provisions of the United States Constitution. This would be true even if the question concerned the care and custody of these children within the State of New York. It is particularly true when the State of New York has *no concern whatever* with this care and custody, since the children were to depart with their father to a foreign country, and their protection in that country,—in so far as the United States maintains a concern therein, devolves upon the Federal Government. Under these conditions neither the Welfare Department of the City of New York nor any other State agency, including its judiciary, have any say in the matter after the Congress of the United States and the Executive Department of the United States Government have spoken. And both have spoken emphatically, the Congress of the United States in the enactment of the laws on the subject of expatriation and the citizenship of minor children,—which is merely a codification of fundamental constitutional rights recognized long before these specific enactments; and the Executive Department by the specific agreement under which petitioner and his children sought to leave for Soviet Armenia.

It is characteristic of the method pursued by counsel for the institutions-respondent that, instead of discussing the provisions of Section 807 of the Nationality Code, they fail even to mention it in their brief. Instead, having barely adverted to the right of expatriation guaranteed by Section 800, they immediately switch to what the State Court said in its attempt to deprive petitioner and his children of the right guaranteed to them by those two sections of the Nationality Code. If what counsel say in this connection means anything, it means that notwithstanding the provisions of the Nationality Code, the basic right of expatriation and of the right of a parent to take his children with him when going abroad, the State of New York has a right to prevent the parent from taking his children with him if it is not satisfied with the protection offered by the provisions of the Nationality Code as to the citizenship and the material well-being of the minor children abroad. It is sufficient to point out that if the proposition thus contended for be correct, the State of New York would have had the right to prevent petitioner's other two minor children from leaving with him for Soviet Armenia. As far as we know there is no difference between petitioner's two groups of children with respect to the Police Power of the State of New York.

The protective power of the State, in so far as it exists, extends to all minors within its borders. Indeed, it would apply to all the minor children who left on the S.S. *Rossia* on November 1, 1947, as well as to others who may seek to depart under the provisions of the agreement between the Government of the United States and the Government of the USSR regarding the expatriation or "repatriation" of Armenians. All such minors born in the United States are exposed to the same alleged hazards as are the petitioner's three children. Surely, if such hazards exist it is the business of the United States to protect these American citizens, and not that of the several States where they, severally, happen to reside at the time of their parents' expatriation.

In enacting Sections 800 and 807 of the Nationality Code Congress was aware of these possible hazards; and so, cer-

tainly, was the Executive Department of the United States in entering into the compact with the USSR covering the expatriation of Armenians. The matter of the material well-being of minor citizens of the United States who were to accompany their parents under this compact was in no situation different than that of petitioner's minor children detained by the institutions-respondent herein. If the doctrine contended for by counsel for respondents herein be correct, each one of the States where such Armenians reside would have the right to inquire into and decide for itself as to the adequacy of the protection afforded the citizenship of the minors by Section 807 of the Nationality Code and the sufficiency of the provisions made in Soviet Armenia for the material well-being of the children.

Nay, they would even have the right to inquire into the religious upbringing that these children would receive in Soviet Armenia. For, it must be remembered, that one of the principal questions tried at Special Term in this case concerned the provision in Soviet Armenia for the religious education of these children, and the motion to dismiss at the end of the entire case stressed the fact that there was no evidence in the case that provision had been made for bringing up these children in the Roman Catholic faith (fol. 1091).

The learned Court at Special Term skirted around the religious question, and the Appellate Courts never adverted to it. But an examination of the Record will clearly demonstrate that the real reason for the decision was the fact that the State Courts undertook to "protect" petitioner's minor children against the kind of religious and political upbringing to which they might be exposed in Soviet Armenia. No amount of beating about the bush, or of double talk, can hide this fact which permeates the Record from beginning to end,—from the clear issue framed by the "returns" made by the institutions-respondent to the elaborate evasion of the issue in the opinion by the Justice who presided at Special Term, nor even by the more labored attempts to evade the issue in the briefs of the institutions-respondent.

III

The Constitution, the statutes, and the compact.

As pointed out in our main brief the basic facts of this case clearly deprive the several States of any power to interfere with the free departure of petitioner and his minor children for Soviet Armenia. This would be so even if Congress had never legislated on the subject,—for, as we have shown, the several States of our Union were never sovereign in the sense that they had the power to prevent the departure of their inhabitants from their territory, and certainly no power to interfere either directly or indirectly, in foreign affairs, as to which the Union was the only existing sovereign power even before the adoption of the Constitution. In this respect the Constitution merely stated explicitly what was implicit in the nature of our Union. And the Act of Congress of 1868, now embodied in the Nationality Code, merely put in statutory form what was theretofore a fundamental constitutional principle implicit in the nature of our Union and antedating the Constitution itself.

It is therefore true, as stated by counsel for respondent Welfare Commissioner on page 5 of his brief that petitioner and his children were possessed of the rights contended for here "without the need for further treaty or agreement" between the Government of the United States and the USSR. But that does not destroy the fact that *there was* such an agreement which has the force of a treaty as shown in our main brief. Counsel for the institutions-respondent without attempting to discuss the constitutional principles involved limit themselves to the assertion that the exchange of notes did not constitute an "agreement". But this Court has stated repeatedly that the form of the document or its lack of form makes not the slightest difference; nor does it make any difference by what name it is called, whether treaty, compact, agree-

ment, arrangement, protocol or *modus vivendi*. It so happens, however, that the State Department itself has called this exchange of notes an agreement. In the telegram sent by the State Department on October 31, 1947, in answer to an inquiry by the respondent Welfare Commissioner, the State Department said:

> "Under *agreement* with Soviet Embassy this Government interposes no objection to departure of persons of Armenian origin whether American Citizens or not from United States to Soviet Armenia." (Emphasis supplied—Petitioner's Ex. 17, fols. 555-556.)

IV

Petitioner's alleged "disappearance".

In their efforts to befog the issue, and to make the decision in this case appear to depend on a question of State law, counsel for the institutions-respondent have resorted not only to matters outside of the Record, but to deliberate misstatements of facts in connection therewith.

On page 2 of their brief counsel say:

> "Accordingly, petitioner on November 1, 1947, boarded the *SS Rossia* • • • and disappeared with his insane wife behind the Iron Curtain."

And throughout the brief there are scattered ambiguous phrases which, taken in connection with the flat assertion of petitioner's "disappearance", would lead the court to believe that petitioner has not been heard from since he left this country and that nobody has been in communication with him. The fact is that on January 15, 1948, two weeks after Mr. Justice Lumbard rendered his decision, Bishop Tiran Nersoyan wrote to him informing him of the decision, and he immediately responded by a letter dated February 18, 1948. At the same time petitioner wrote to his counsel and also to the respondent Welfare Commis-

sioner enclosing a formal demand for the transfer of his children to a Protestant home or a private Armenian family with a view to having them educated in his own religion. The original of the documents addressed to the Welfare Commissioner are in the possession of that respondent; and copies of all of them have been served on all of the respondents. Copies are also on file in a proceeding now pending in the Supreme Court, New York County, known as No. 33360/1948, being the proceeding referred to on page 33 of respondents' brief. The letter to the Welfare Commissioner reads as follows:

"February 18, 1948
Orjoonikidze Street
No: 95, House 13
Erevan, Soviet Armenia

Hon. Benjamin Fielding, Commissioner of
Welfare of the City of New York, and
the Department of Welfare of the City
of New York
902 Broadway
New York, N. Y.

Gentlemen:

It is my wish that my daughter, Alice, who is at present in the physical custody of the New York Foundling Hospital, and my sons, Albert and George, who are at present in the physical custody of the Mission of the Immaculate Virgin, be reared in the faith of the Armenian Apostolic Orthodox Church. I do not wish them to remain in or to be reared in any other faith or religion.

All of my children, as well as my wife and I were baptized in the faith of the Armenian Apostolic Orthodox church, with the exception of Alice, the youngest child. I had previously consented to the baptism of the children as Roman Catholics under circumstances which I believed left me no alternative but to consent to such baptism. However, I want my children reared only in my faith and in no other faith, and I want you to take the necessary steps to put my wish into effect immediately after you receive this letter together with a formal demand.

I also request that my children be transferred to a Protestant institution. I have been informed by Bishop Tiran of the Armenian Church of North America and by Dr. Robert W. Searle of the Protestant Council of the City of New York, that they will make this possible. It is my hope that until the children rejoin me and the family that they can be placed through a Protestant institution in a satisfactory home of Armenian people of my faith. Therefore, I respectfully ask that you consider suggestions along this line from Bishop Tiran.

This letter together, with my formal demand will be delivered to you by my attorney, Mr. Samuel M. Blinken, to whom I have sent the papers with a request that he make such delivery to you.

Respectfully yours,

HAMPORTZOON CHOOLOKIAN."

The letter addressed to Bishop Nersoyan reads as follows:

"February 18, 1948
Orjoonikidze Street
No: 95, House 13
Erevan, Soviet Armenia

Bishop Tiran Nersoyan
Primate of the Armenian Church
of North America
336 West 20th Street
New York, New York

Your Grace:

I beg to acknowledge your letter of January 15, 1948. I am deeply grateful for the interest you have taken in the case and in the effort to obtain the freedom of my children, so that they may join me and my family in Soviet Armenia. I also appreciate the interest shown by the Protestant Council through Dr. Searle and the action of the American Civil Liberties Union in my behalf and would ask that you convey to them my thanks and the thanks of my family.

I can tell you that for the first time in my married life I have been able to establish a home for my family here in Soviet Armenia. You have no idea what it

means to be reunited with my family and old friends and to be together with my children in one home where we live happily together. My wife is being taken care of at the Erevan Psychotherapeutic Hospital, Gooniney Street, No. 93, Erevan, Soviet Armenia, where I frequently see her, and it would make all of us happy if my children in America could be together with us. Our happiness would be complete if my wife was well, but that is a matter for time and treatment to determine.

I heartily approve of the position you have taken and of your actions. You are perfectly right when you say that I tried to have the children transferred to a Protestant institution when I was in America. I wanted the children reared in the Armenian Apostolic Orthodox faith, which is my faith and the faith of my wife. The Department of Welfare arranged to place them with the two institutions because there was no Armenian institution to put them in. All of the children except Alice were baptized in my faith, that is the faith in which I wish them to be reared. However, when no Protestant institution could be found to accommodate my children, and not knowing what I could do about it, and since I did not wish to uproot them at the time, I agreed to let them be baptized as Roman Catholics. This was an act of expediency. I did it for the physical welfare of the children. It was not my intention then to have them reared as Roman Catholics but merely to have a place over their heads. Now I want them reared in my faith; I can take good care of them; I want them with me for I know they will be contented, well taken care of and happy. I am only too glad to authorize you, Dr. Searle and Mr. Blinken to take steps on my behalf for you will be doing exactly what I want you to do and I count on your cooperation and good will.

I am sending an authorization to Mr. Blinken, requesting that he deliver it to the Department of Welfare as well as to give separate copies to you and Dr. Searle. In that way the Department of Welfare will be instructed to have my children reared in the Armenian Apostolic Orthodox faith, to transfer the children to a Protestant institution and to enable you, Dr. Searle and Mr. Blinken to inquire about and to see my children on my behalf, as well as to carry out all

of my wishes in connection with my children. In addition, I am sending Mr. Blinken other papers to authorize steps to free my children in order that they can be sent to me.

Let me thank you for everything that you have done and that you will do in order to restore my children to me.

Respectfully yours,

HAMPORTZOON CHOOLOKIAN"

V

The State Courts made no finding of fact which would take this case out of the domain of federal law; nor is there any basis in the record for any such findings.

In an effort to justify their failure to argue the constitutional questions, counsel for the institutions fall back upon an alleged finding by the New York State Courts that petitioner was unfit to take care of his children, and the contention that petitioner was uncertain in his own mind as to the religion in which he wants his children reared. In the latter connection they refer to the so-called "Case History" of the Welfare Department, which is not part of the Record certified by the Court of Appeals, but was used in the New York Courts.

We have already demonstrated that petitioner's alleged unfitness or incapacity to take care of his children in Soviet Armenia is not a matter with which New York State is concerned. Nor is there any legal significance to his alleged vacillations on the subject of his children's religious upbringing at some time prior to the institution of the present proceedings.

Actually, however, the New York Courts made no such findings as are contended for by the respondents; nor is there any basis either in the certified Record or in the Case History for any such findings, and for the assertions that petitioner was at any time uncertain as to the religion in which he wanted his children brought up.

I. Petitioner's general character.

We respectfully submit that a reading both of the Record certified to by the Court of Appeals as well as the "Case History" will clearly demonstrate that petitioner not only was a loving father but capable of the greatest sacrifices in taking care of his children, and was generally high-minded and self-reliant,—preferring to live poorly on his own earnings rather than to be an object of charity even if the charity was public and not private. On the latter subject we call attention to the following entry on pages 2-3 of the Case History:

> "In July of 1933 Mr. C. was placed on Work Relief but was forced to give up the job in January of 1934 because of a hernia. In May 1935 Mr. C. requested that the case be closed because he had secured a job in Copian Grocery Store in New Jersey where he was earning about $58.00 a month. Although the family were in need of supplementary relief, in view of the father's low earnings, Mr. C. much preferred to remain off the relief rolls and did not make application for supplementary assistance."

Later portions of that History show the great sacrifices which petitioner was willing to make in order to keep his children together; and that his placing the children with the public institutions was forced upon him by continued misfortunes. His sense of responsibility and concern for and love of his children were also testified to at the trial, and was even given grudging recognition by the learned Justice who disposed of his children's fate (fols. 215-216, 254, 519, 521, 523, 524, 526, 561-562, 566-567, 1178).

II. Petitioner's concern about the religion of his children.

Counsel for the institutions-respondent would have this Court believe that petitioner had no firm conviction or settled desire with respect to the church or religion in which he wanted to bring up his children. But the Record discloses that at no time did petitioner have any doubt as to what religion he wanted his children to be brought up in

and that his consent for their baptism as Roman Catholics was wrung from him by the unfortunate circumstance that there was no institution of his own faith which could take care of the children, no Protestant home which had room for them, and by the refusal of the institutions-respondent to further care for them unless they were baptized as Roman Catholics (fols. 707, 915).

It is true that when the question of religion first came up he said that he preferred Catholic institutions to Protestant, but that was clearly due to a confusion in the interpretation of the word "Catholic". In this connection the attention of the Court is respectfully called to the fact that when petitioner was confronted with the question he said that he was a Catholic but did not believe in the Pope (fols. 727, 733). The head of the Armenian Church testified that that Church called itself "Catholic" in the sense of its being an "Orthodox" or "true" Church but that it was not Roman Catholic (fol. 785). As soon as petitioner discovered his error, and the fact that his Church was nearer in doctrine to Protestantism than to Catholicism, he demanded of the Welfare Department that his children be transferred to Protestant institutions. The Welfare Department thereupon began its long efforts to effectuate such a transfer, but without success. As to his real feelings upon his discovery of the true relation between his Church and the Roman Catholic and Protestant Churches, respectively, the Case History has the following to say under date of June 1, 1942:

> "Father called at the office on marginal date, although no appointment had been made to see him in the office. He repeated the information regarding his distress over his children's placement in a Roman Catholic institution. We mentioned that that had been his own request and that he had signed an affidavit to that effect and that we were rather surprised that he had again changed his mind regarding the religious question. Mr. C. stated that he realized that he had made 'a terrible mistake and that he was sorry', but hoped that something could be done to transfer his

children to an institution where they could follow the Greek Orthodox faith. We reiterated our previous discussion regarding lack of institutions for his particular faith and reminded him that we had suggested that his children be placed in a Protestant institution but that because of his protest, they had been placed at the Mission of the Immaculate Virgin, a Roman Catholic institution. Father repeated that he is not a Protestant, does not want his children in an institution of that faith but does not want them in a Roman Catholic institution either. Only after another lengthy discussion regarding this, and after we had Mrs. Hickey, Unit Supervisor, speak to father to again explain regarding the religious question did he decide to have them transferred to one of the Protestant faith. He stated that he does not wish to have his children rebaptized in the Roman Catholic faith; that they had already been baptized once and that is enough. We questioned whether this was a decision reached by Mr. C. himself or whether it had been decided for him by his priest, Reverend Ferringer. Mr. C. stated that he had spoken to his priest but does not know his name as he seldom attends his church for religious services. We decided to phone both the M. I. V. and N. Y. Foundling while father remained at the office in order to secure their version of the religious question and to ascertain whether they had made any attempts to rebaptize the children under their care" (C. H. pp. 23-24).

That the confusion was not only in petitioner's mind but in the minds of other people who were supposed to be better versed in such matters is apparent from the fact that those who made the entries in the Case History referred to petitioner's Church as "Greek Orthodox", and as "Russian Catholic" (fols. 704, 723, C. H., p. 23).

III. The State Courts made no finding that petitioner was unfit to take care of his children; nor could it have made any such finding in the face of the Record.

We respectfully submit that there is not the slightest warrant in the Record for the assertion made by counsel for the respondents that the New York State Courts had

found petitioner to be unfit to take care of his children. Indeed, such a finding could not possibly have been made in view of the Record. Had such a finding been made this Court, under its own rules, would have been obliged to disregard it, since it is belied by every page of the Record. Without burdening this brief by quoting copiously from the certified Record and the Case History it is sufficient to point to the fact that the Welfare Department had released to the petitioner his three oldest children in August and September, 1946, and had actually consented to the release to him of the three children involved in this litigation on the very day the writs were sued out. The question of "unfitness" is therefore clearly out of the case, even if it ever had a place in it,—*which it certainly did not and does not.*

IV. The "best interest of the children" sought to be "protected" by the State of New York did not include their material welfare.

The only actual finding which the Courts of the State of New York made in this case was that it would not be "for the best interest of the children" to accompany their father to Soviet Armenia. And a careful reading of the long opinion delivered by the learned justice at Special Term clearly demonstrates that the "best interest of the children" had nothing to do with their material welfare, but solely with the danger apprehended by him from their exposure to religious and political ideas of which he disapproved plus the alleged hazard to their American citizenship. It is true that he made a labored attempt to show that there was no sufficient guarantee of their material welfare in Soviet Armenia. But that attempt utterly failed, and this Court would have a right to disregard his animadversions on the subject of the Soviet guarantee even if it had a place in this case,—which it certainly hasn't.

Counsel for respondents, following their determination not to discuss the constitutional questions involved in this case, ignored the legal aspects of this question in their brief. Instead, they attempt to disparage the guarantee

of the Soviet Union by asserting that it was too vague. And here, again, faithful to their method of disparaging the salient facts in the case, they conveniently forget the fact that there were two documents delivered by the Soviet Union to the Welfare Department of the New York City, *and that the second document was prepared by the Welfare Department itself.* The Record shows that the first document was not satisfactory to the Welfare Department because of alleged vagueness. Thereupon the Department prepared its own document to meet this objection; and that it was after the execution and delivery of this second document, that the Welfare Department consented to the release of the children. We have pointed out in our main brief that the Welfare Department had no right to exact such a guarantee. But there it was. *And it was in the very language of the Welfare Department, specifically chosen to meet the objection of vagueness* (fols. 562, 566, 573-574, 575, 577-580, 1025-1028).

As we have already stated, this entire question of the material welfare of the children in Soviet Armenia was outside the competence of the State of New York to inquire into. *This question is therefore constitutionally outside this case.* However, in view of the fact that counsel for the institutions have devoted practically their entire brief to this subject, we may be excused for devoting a little more space to it. While it does not bear on the legal problem involved, it does show a lack of *bona fides* on the part of counsel for the respondents in claiming that this issue had been properly determined against the petitioner according to the law of the State of New York, and a similar lack of *bona fides* in the claim that the Welfare Department had never consented to the release of the children on October 31, 1947.

It should be borne in mind that under the law of the State of New York the Welfare Department of the City of New York is the agency especially entrusted with the material and moral well-being of children in its custody, and vested with the power of determining the circumstanecs

under which children committed to its care may be released to the custody of their parents. The question of determining whether such a release is for "the best interest of the children" is therefore, primarily, one for the determination of the Welfare Department. The Courts have nothing to do with it, unless resort is had to them by an aggrieved parent claiming that the decision of the Welfare Department was arbitrary.

In making this determination it is, of course, for the Welfare Department to determine all the questions which may affect "the best interest of the children". The Record shows that the Welfare Department was well acquainted with petitioner and his circumstances for many years past, and that it made a special investigation of the matter when he applied for the release of these children with the view of taking them to Soviet Armenia. It also shows that after such investigation it decided to release the children. That such determination was deliberate and made upon careful examination of the facts is also shown by the Record. On cross-examination by Mr. Coster, who now seeks to impugn that decision, Deputy Commissioner of Welfare Crystal M. Potter, who was in charge of the matter, testified as follows:

> "The *decision* in this individual case was based on information that I had received from Miss Shea and Miss Zimmerman, and the various factors which were that this father in this case had been a good father, he had been interested in the welfare of his children; we had every indication he loved his children; in fact, both the Institution and the Department of Welfare had agreed to release three of his children previously to him on the basis of the fact that he was a proper father; so that was one consideration. * * * We had letters from the Soviet Embassy indicating that these children would receive proper care. These children themselves, from the information I had, were very anxious to be reunited with their family. Our whole emphasis in the Department of Welfare, as it is with the private agencies, is to reunite families whenever possible, and I think in brief that was the reason behind the *decision*" (fols. 1067-1069). (Emphasis supplied.)

V. The question of the Welfare Department's consent.

The question of whether or not the Welfare Department had consented to the release of the Choolokian children is immaterial in this case, since they were entitled to their release irrespective of the State agency which sought to prevent the departure of the children from the United States. It is important, however, because it is a brick in the structure of State law which counsel for the respondents seek to erect in order to take this case out of the Federal domain. But upon examination it turns out to be a false brick.

Under the law of the State of New York the decision of the Welfare Department is final, and there is no provision in the laws of the State of New York for a resort to the courts by any person or institution dissatisfied with the decision of the Welfare Department to release its wards. In this case, however, the institutions-respondent refused to comply with the decision of the Welfare Department, *after they had first agreed to do so and actually prepared the children for departure,* with the result that petitioner had to resort to the courts (fols. 595-599).

That the Department had consented to the release cannot possibly be questioned in view of the testimony quoted above and the physical facts of the preparation of the children for their departure by the institutions themselves under instructions from the Welfare Department. Nor was the fact of *consent* actually questioned by the institutions-respondent or their counsel,—their claim being merely that they had a right to refuse to carry out that decision unless ordered to do so by the courts. In his brief in the Court of Appeals, Mr. Joseph V. McKee, one of the counsel signing the brief in this Court, made the point that the *consent* of the Department was insufficient and that a formal *order* was necessary. His exact words were as follows:

> "There seems to be little doubt that at one time previous to appellants suing out the writ, the Department had informally decided that the children could be trans-

ferred to appellant. This was in no sense an *order*. It was merely the *consent* of an agency having administrative or supervisory powers." (Italics in original.)

It so happens, however, that the statute in question (Section 383 of the Social Welfare Law) itself differentiates between *consent* and *order*. It does not require any *order* by the agency having charge of the children. The only provision for an *order* is a *court order* where resort to the Courts must be had because of the absence of the consent of the Committing Authority.

Nor did the Court of Appeals decide that a formal order was necessary.

In this Court, the same counsel claim that the decision of the Welfare Department was merely "tentative". This is clearly refuted by the following testimony given by Deputy Welfare Commissioner Potter:

"Q. *Are you the same Deputy Commissioner Potter who ordered the release of the three Choolokian children involved in this proceeding?* A. *Yes, I am.*

Q. *And did you order the release of those children after a review of all the facts in the case and consultation with counsel to the department?* A. *Yes, I did.*

Q. *Did you ever issue any order rescinding or changing your order for the release of these children?* A. *No, I didn't*" (fol. 1046).

"Q. *So far as the issue in this case is concerned, you have done nothing to change the order for the release of these children at any time subsequent to the order that you gave for their release?* A. *That is right*" (fols. 1050-1051). (Emphasis supplied.)

With this brick out, the entire structure of alleged State law falls apart, for the only agency which was expressly entrusted by the laws of the State of New York with the decision as to the propriety of the release of the wards in its custody has decided that their release was in the "best interest" of the Choolokian children.

VI. The real reason for the decision sought to be reviewed was the character of the political and religious ideas to which petitioner's children might be exposed in Soviet Armenia, plus the alleged hazard to the children's citizenship.

We respectfully submit that no one reading the record in this case can possibly excape the conclusion that the real reason for the decision sought to be reviewed is to be found in the two words "Soviet Armenia,"—or perhaps more exactly in the word "Soviet". In other words, the objection of the institutions-respondent and the New York State courts to the fact that petitioner's children would, if released into his custody, be exposed to religious and political ideas of which they disapprove. It is difficult to determine from the record which weighed more with whom. Probably the institutions-respondent were primarily interested in insuring the children's continuance in the Roman Catholic Church, while the courts were more interested in "protecting" the children's political ideas. This question need not detain us, since both considerations are equally obnoxious to the constitutional principles invoked by petitioner for the protection of his own rights and those of his children. Again, because of the elaborate attempt of counsel for respondents to cover up this fact we hope to be excused for giving a brief resume of the facts as they appear in the record.

The "story" begins when, to quote the language of the counsel for the institutions-respondent in their brief (pp. 11-12) in this Court——

> "* * * the respondent institutions remonstrated over the inadvisability of sending the children to permanent exile in Soviet Armenia, and stated that under the circumstances and on advice of counsel they would not feel warranted in releasing them without a court order."

The Record shows that at no time in their history had either of the institutions-respondent ever refused to obey such a decision of the Welfare Department (fols. 1014, 1042). Indeed, they could not possibly do so, since they

have no shadow of legal right to keep such children except that given them by the Welfare Department. This revolt of the institutions against the Welfare Department was followed by their "returns" to the writs of habeas corpus, the substance of which was the same as their "remonstrance" as formulated above by their counsel. And this was followed by a long trial mainly devoted to an inquiry into three questions, in the following order of importance: (1) the religious education of the children of Soviet Armenia; (2) The "Un-American" way of life to which they might be exposed in that country; and (3) the hazard to the children's citizenship because of their going to Soviet Armenia. All the rest, whatever there was of it, was mere pretense and shadow-boxing designed to hide the real constitutional issues behind a false facade of State Law.

CONCLUSION

We respectfully submit that this case involves grave constitutional questions important, to quote the language of one of the counsel for the institutions-respondent, "to every American citizen and every American institution". These questions have therefore properly aroused great public interest, and the active participation in this struggle for political and religious liberty of the American Civil Liberties Union, whose interest in civil liberties is well known, and such important religious bodies as the Protestant Council of the City of New York and the Armenian Church in North America, besides such important religious and civic leaders as have banded together in order to form the "National Committee for the Rights of the Choolokian Family". The writ of certiorari prayed for should therefore be granted.

Dated: New York, February 16, 1950.

Respectfully submitted,

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Office - Supreme Court, U.
FILED
FEB 10 1950
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

—against—

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

—against—

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Introduction and Summary

In their zeal to build up some color of Federal claim, having no foundation in this record, petitioner's counsel have passed over, or mis-stated, most of the facts of this case, and have neglected to deal with the one fundamental question at issue.

The case involves the custody of three destitute minor children, native-born citizens of the United States and wards of the State of New York. Their alien mother, if still alive, is hopelessly insane. Because of the mother's insanity and his own inability to support his children, the father voluntarily surrendered them in 1942 to the New York City Department of Welfare, asking that they be placed in Catholic institutions.

At the trial in 1947 the father testified, and his counsel conceded, that he was still unable to support them. He felt, however, that if he took them with him to Soviet Armenia, the Soviet Government would somehow take care of them.

Accordingly, petitioner on November 1, 1947, boarded the S. S. Rossia in New York, executed a renunciation of his American citizenship, and disappeared with his insane wife behind the Iron Curtain. The children have not heard from either of them since.

Section 383 (1) of the Social Welfare Law of New York provides:

> "The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

Under that Section the sole question for determination below was whether the welfare of these three wards of the

State of New York would be promoted by removing them from the foster care where two of them had spent nearly six years, and where the youngest had spent her entire life, and surrendering them to a father admittedly unable to provide for them, for permanent exile in the custody of the Soviet Government. The Department of Welfare declined to take the responsibility of making any such determination and left the matter to the courts of New York. Those courts, after full and careful consideration, and in the exercise of a reasonable discretion, unanimously found that the welfare of the children would not be promoted by the demanded change of custody, unanimously found the father unfit, and entered judgment accordingly.

That is all there is to this case. In their petition, and in the public press, petitioner's counsel have endeavored to befog the issue by injecting a series of extraneous and wholly unfounded arguments, and have endeavored to make the case appear as a personal conflict between an oppressed father and the sinister forces of religious and political intolerance and reaction. It is nothing of the sort. The sole question at issue, although petitioner's counsel never mention it, is what would be best for these three children. The courts of New York have done their utmost to solve that question of fact impartially and conscientiously. We submit their findings were right and should stand.

How any Federal question is presented passes all comprehension. It was established, and indeed in substance conceded below, that if the petitioner had asked the surrender of the children for the purpose of living with him in New York or in any other state of the Union, considerations of their welfare, and of his own unfitness, would have required a denial of his request. It is now claimed, however, that because he said he wanted to expatriate himself and

take them to Soviet Armenia, his request should have been granted as a matter of absolute Federal right, which neither the State of New York nor anyone else may dispute. That is the sole basis on which this Court is now asked to intervene.

ARGUMENT

POINT I

The sole question for judicial determination, the welfare of the children, here presents no Federal issue.

That a State, as *parens patriae*, has the right to protect the welfare of infants is axiomatic. The Court of Appeals of New York, speaking through Judge Cardozo, stated the principle thus:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless [citing cases]." *Finlay* v. *Finlay*, 240 N. Y. 429, 431 (1925).

Accordingly in New York

> "The Supreme Court, as the guardian of all infants, has inherent power, in a proper case, to take the custody of the child, even from its general guardian. [citing cases] The right of the general guardian is the same as that of the father, and must submit to the same regulation and control." *Matter of Lee*, 220 N. Y. 532, 539 (1917).

The same principle was thus laid down by the Court of Appeals for the Sixth Circuit in *Carqueville* v. *Woodruff*, 153 F. 2d 1011, 1012 (1946):

> "The right of a parent to the custody and control of his child is not absolute, but may be lost by agreement, misconduct or unfitness. [citing cases]"

In the present case, the question is not as to the power of the State or its courts to protect children by taking them away from their natural parents,—though even that power exists in appropriate cases. The question is as to changing the custody of children voluntarily surrendered years ago by their father because he could not then, and cannot now, provide for them.

Where such a change of custody is proposed, the sole issue is the welfare of the children. All other issues are either secondary or nonexistent. As petitioner's counsel himself stated at the trial (R. 42):

> "The rule to consider is the welfare, the physical well-being, the mental well being, of these children."

That was the sole issue so painstakingly considered and decided by the courts of New York. We submit it raises no Federal question.

Under Section 383(1) of the Social Welfare Law of New York (quoted *supra* p. 2), before the change of custody could be granted, one of two conditions must be fulfilled. Either the responsible public official (in this case the New York City Commissioner of Welfare) must consent to the change after finding that it will be for the best interest of the children; or a court of competent jurisdiction must determine both (a) that the interest of the children will be promoted by the change of custody *and* (b) that the parent

is "fit, competent and able" to duly maintain, support and educate them.

In the present case the Commissioner did not consent. The courts of New York upon the evidence unanimously found both (a) that the children's welfare would not be promoted by the proposed change of custody and (b) that the father is not "fit, competent and able" to duly maintain, support and educate them.

(a) *The facts leading up to the decision below.*

At the trial petitioner's counsel described as "an excellent job," and offered in evidence as his Exhibit 15, the voluminous file of the New York City Department of Welfare on the Choolokian family (R. 170-1). That file, with other exhibits, was omitted on his motion from the printed papers on appeal, under an order which provided that all such exhibits should nevertheless be considered a part of the appeal record and could be used or referred to on appeal (R. 400). The original file has accordingly been transmitted to the Clerk of this Court; and the most important part of it—the "Case History"—is submitted under separate cover* in printed form.

From the file of the Department of Welfare, and from the testimony at the trial, certain simple and undisputed facts were established.

The Choolokian family had been the concern of various public and private welfare agencies in New York City for some fifteen years. The family apparently first went on home relief in 1932 (C.H. 2). In 1937 four of the children

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* References to the printed transcript of the record are cited in this brief as "(R.)." References to the Department of Welfare's Case History, forming part of Petitioner's Exhibit 15, and submitted separately herewith, are cited as "(C.H.)."

were committed to institutions, but were subsequently released (C.H. 11).

Early in 1942, following the birth of her sixth and last child, the mother (who apparently was never naturalized, C.H. 49) exhibited symptoms of insanity. The father again asked for public help. A case worker from the Department of Welfare reviewed the record, visited and talked with the family, and summarized her findings as follows (C.H. 3):

> "The home conditions have always been described as rather deplorable, the family living in apartments badly in need of repairs. The home is sometimes described as 'filthy'. Mr. and Mrs. C. have had a long history of hospitalization at Bellevue. * * * Through the record we can observe a lessening interest in living independently of public aid. Mr. C. becomes less cooperative and indicated unwillingness to secure work."

Shortly afterwards the mother became hopelessly insane and was committed to a State mental hospital, where she remained until she was released to return with her husband to Soviet Armenia (R. 174; C.H. 6, 13, 32, 57).

With the mother insane, and the father out of work, something obviously had to be done. After extended interviews and discussions, the father surrendered his six children to the Department of Welfare, specifying that they be placed in Catholic institutions. (The question of religion is discussed further *infra* pp. 28-33.) The five older children were accordingly placed in March and April of 1942 with the respondent Mission on Staten Island. The youngest child Alice, then only a few weeks old, was transferred directly from Bellevue Hospital, where she had been born, to the respondent Foundling Hospital (C.H. 9).

The Department of Welfare continued to have contact with the problem. In August and September, 1946, having obtained what appeared to be a regular job, the father asked the Department to release his three older children, then ranging in age from 16 to 12. The Department granted his request (C.H. 38-40). He attempted to re-establish a home with these three, but was not too successful (C.H. 43-44, 49). The three younger children (subjects of this proceeding), then aged 11 to 5, remained in care of the respondent institutions.

The trial court correctly summarized the situation when it found (R. 393):

> "It is apparent that he has a genuine affection for the children but the misfortunes and difficulties of life have been too much for him to cope with and, as the numerous reports of the Welfare Department indicate, he has been confused and bewildered by a multitude of problems beyond his ability to solve. A reading of the voluminous records of the Department of Welfare also shows that the father has almost always had considerable difficulty in controlling the children."

Some time in the latter part of 1946 the father, apparently influenced by propaganda put out by the Soviet Government, conceived the idea of returning to Armenia. He broached the subject to his eldest daughter, who was at home. She thereupon ran away. At the trial the father testified on this subject as follows (R. 85):

> "Q. Did you talk to Susie about going back?
> A. That's right.
> Q. She didn't want to go back?
> A. That's right * * *.

Q. Why did Susie leave you?

A. Don't like to stay. He [she] don't like to go back or go Armenian or stay with me."

With the two other children then at home (aged 13 and 16), his persuasions were apparently more effective; and they accompanied him to Armenia on November 1, 1947. Since then there has been no communication from them.

The three younger children who are the subjects of this proceeding are George (now aged 14-1/2), Albert (now aged 13) and Alice (now just over 8). George and Albert have been in the care of the respondent Mission since March of 1942. Alice has been in the care of the respondent Hospital since birth.

The trial court questioned the father on the subject of the younger children as follows (R. 127):

"Q. Mr. Choolokian, have you talked with the two boys, George and Albert, about their going back to Armenia?

A. Yes. The kids I don't know they scared to tell me."

All of the Choolokian children, including these three, are native-born citizens of the United States and of the State of New York (R. 77). Not one of them (except, of course, the two who returned with the father) has ever been in Armenia. They can speak no Armenian. (*cf.* R. 80) Their entire upbringing and education have been in American schools. Their views about being sent to Soviet Armenia can best be gathered from their father's statement as to Susie running away and George and Albert being "scared to tell me."

Although the father had apparently been considering his return to Soviet Armenia for about a year (*cf.* R. 84; C.H. 49), it was not until October 24, 1947 that he notified the New York City Department of Welfare of his plans or made any attempt to regain custody of his three younger children (C.H. 45). The S. S. Rossia, chartered by the Soviet Government, was due to sail on November 1st, a week later. During that week there was a series of discussions by officials of the Department of Welfare and representatives of the two respondent institutions. Those discussions were the subject of considerable testimony at the hearing, and are recorded in the Department's Case History at pp. 45-60.

In petitioner's brief (p. 8; *cf.* p. 10) his counsel assert:

> "• • • the said Department of Welfare agreed to release the said children into his custody, and directed the two respondent institutions to deliver the said children into his custody."

This is an entirely erroneous statement of what actually happened, and is directly contrary to the findings of all the courts below.

What happened was this: Faced with the necessity of making a decision on an issue of such paramount importance to the future of its three young wards, the Department of Welfare did its best within the limited time available to ascertain what would be best for the children. It is the standard practice of the Department in all cases where a change of custody is proposed (including cases where it is proposed to take children to another city or to another state of the United States) to obtain specific information on the kind of care which they will receive in the place to which they are going, and to contact appropriate child-welfare or other agencies in the proposed new location (C.H. 51, 55; R. 358-9).

Accordingly the Department attempted without success to find out from the State Department, from the International Migration Service, from the so-called Volunteer Committee for the Repatriation of Armenians, and from the Soviet Consul, just what would happen to the children when they got to Armenia and what provisions had been made for their welfare (C.H. 46-50). The State Department replied in substance that it knew nothing about the scheme except that it had agreed to permit "persons of Armenian origin" to leave the United States without passports on the assumption and understanding that they were relinquishing their American citizenship and becoming Soviet citizens (R. 185-6; C.H. 59). The International Migration Service was unable to supply any information, and expressed its astonishment that the father would consider taking his children to Armenia (C.H. 52). The Treasurer of the Armenian Volunteer Committee said that the Department's request for information amounted to asking for "the impossible" since the Committee itself had been "unable to get any information from Soviet Russia" (C.H. 51). The Soviet Consul gave no information beyond stating in substance that passage was being paid by the Soviet Government, that everything would be wonderful in Soviet Armenia and that if the father could not take care of his children on arrival the Soviet Government would (C.H. 55, 56-7). On the basis of these vague assurances, the Department of Welfare on October 31st tentatively concluded to discharge the children to their father, and notified the two respondent institutions by telephone to prepare the children for discharge accordingly (R. 199, 239, 293-4, 298-9; C.H. 60). The "discharge slips" customary in such cases were not prepared (R. 212).

Before the Department's oral instructions could be carried out, the respondent institutions remonstrated over the

inadvisability of sending the children to permanent exile in Soviet Armenia, and stated that under the circumstances and on advice of counsel they would not feel warranted in releasing them without a court order (R. 279; C.H. 60). The Department of Welfare thereupon reconsidered its views, and decided to leave the matter to the courts (R. 258; C.H. 60). The previous oral instructions to the institutions to prepare the children for release were countermanded by telephone (R. 272-3, 294-5, 298-9); and the last entry on the Department of Welfare's Case History records a statement by the Deputy Commissioner "that no further action by the Department would take place". (C.H. 60) Petitioner's counsel on the evening of October 31st, 1947, thereupon sued out writs of habeas corpus returnable at 8:00 o'clock the following morning, the ship being due to sail at 10:00. He had threatened to sue out the writs some two days earlier (C.H. 52).

The matter came on for hearing before Mr. Justice Lumbard of the New York Supreme Court at 8:00 A. M. on November 1st, 1947. It being obviously impossible to hear the testimony and make a proper decision in a space of two or three hours, Mr. Justice Lumbard, after hearing the testimony of the father, suggested that he be permitted to depart as scheduled, with the understanding that his departure would not prejudice his rights, and that the matter of the children's custody should be determined after opportunity for more adequate consideration. This was agreed to (R. 135-6).

After further hearings, and the submission of briefs, Mr. Justice Lumbard handed down an opinion (R. 386; 192 Misc. 454) in which he held that the father was unfit and that it was for the best interests of the children that they should remain in the custody of the institutions where the

father had asked the Department to place them. He accordingly dismissed the writs. His decision on both facts and law was reviewed and unanimously affirmed by the Appellate Division without opinion (R. 406), and again unanimously, with two brief opinions, by the Court of Appeals* (R. 436).

(b) *The issues before the Courts of New York.*

These children were voluntarily surrendered, under the circumstances just outlined, by their father in early 1942 to the custody of the Department of Welfare of the City of New York. After full consideration and explanation he then signed the appropriate commitment papers required by the law of New York (R. 152; C.H. 20).

Only two questions were presented for determination by the trial court. Under Section 383(1) of the Social Welfare Law of New York (quoted *supra*, p. 2) those questions were:

> (1) Whether the Commissioner of Welfare (the "official responsible for the commitment of such child") had consented to the proposed change of custody.
>
> (2) If not, whether the court could properly determine (a) "that the interest of such child will be pro-

---

* In dismissing the writs the trial court directed (R. 398):

> "The dismissal, however, is without prejudice to the right of the relator or any properly authorized person to make further application upon a showing that the rights of the children as American citizens would be protected and respected, that the interests of the children would be promoted by taking them to Soviet Armenia and that the father is fit, competent and able to duly maintain, support and educate the children in Soviet Armenia."

Any implied limitations thus imposed on future applications were stricken out by the Court of Appeals (R. 436), thus leaving the field entirely open for further claims by the petitioner at any time.

moted" by the change, *and* (b) "that such parent is fit, competent and able to duly maintain, support and educate such child".

(1) On the question of alleged consent by the Commissioner of Welfare, the evidence has been summarized above (pp. 10-12). At the trial, counsel for the Department of Welfare said (R. 52-3):

> "In this particular case there is no question but that if this man had asked at this moment for the return of the children to him in this country they would not have been returned because he is in no position financially to support them."

At R. 54-55 counsel for the Department of Welfare left the matter for determination by the court, saying:

> "If the agency [i.e. the respondent institutions] takes the position and is prepared to defend the position that it is not in the best interests of the children to release the children, we will not force the agency or attempt to force the agency to release the children and that is an issue which the Commissioner felt should be determined by the Court, particularly since we were in no position to argue pro or con on the issue;* * *"

The trial court accordingly found (R. 386):

> "The Commissioner of Welfare of the City of New York, who has been represented throughout these proceedings, has taken no position regarding this writ, and has held in abeyance his order for their release to join their father, stating that in view of the position taken by the Mission and the Hospital he would leave the matter for

decision by the court. Consequently, the Commissioner has not given the consent required by Section 383 of the Social Welfare Law".

(2) The trial court therefore went on to consider for itself the questions (a) whether the interests of the children would be promoted by surrendering them to the father for transportation to Armenia, and (b) whether the father was "fit, competent and able to duly maintain, support and educate" them. It decided both questions in the negative.

Both of these questions, we submit, were peculiarly questions of fact and of judicial discretion, properly determinable by the trial court which observed the parties and was in position to weigh and consider any possible conflicts in the evidence. Its findings are plain and unambiguous. They are fully supported by the record. They were unanimously affirmed by both of the appellate courts. They present no Federal question and nothing to warrant review by this Court. There is no claim of denial of procedural due process at any stage.

That the father was totally unable to support the children was unequivocally conceded twice by his counsel at the hearing. At R. 58 petitioner's counsel said:

"Let's get one thing definitely clear. We do not assert, nor have we ever asserted, that the relator here as he is now constituted is able properly to maintain the children. That is an undeniable fact, that he is not."

Again at R. 83 occurred the following:

"Mr. Coster [Counsel for the respondent Mission]:

Q. It is conceded that he cannot support these children himself?

> Mr. Blinken [Counsel for petitioner]: A. Well, now, I said that three-quarters of an hour ago."

After hearing considerable evidence on the subject, and after studying the entire Case History of the Department of Welfare (submitted by petitioner's counsel), the trial court accordingly found (R. 394):

> "In view of this background it is clear that if the father were now applying for the release of these three children to his care in New York City he could make no satisfactory showing that the interests of the children would be promoted by such release and that he is fit, competent and able to duly maintain, support and educate these three children, in addition to the three already intrusted to him, as is required by the Social Welfare law. This much was conceded by his counsel."

In his briefs in the lower appellate courts, petitioner's counsel vehemently denied that he had made any such concession. His own words, quoted above, are a sufficient answer to that denial.

But the matter does not rest on counsel's concession alone. The father himself testified that he had been unable to take care of the children (R. 73), that they were being well cared for at the respondent institutions (R. 78), that he had not saved any money and that he had no money at the time of the trial (R. 82). He had no plans as to what he was going to do when he got to Armenia, except that he hoped to find work as a shoemaker (R. 78-9). He testified that his passage was being paid by "all my organized Armenian office" (R. 82) and that he was giving up his American citizenship because "That is what it got to be" (R. 83).

An official of the Soviet Consulate, called as a witness by petitioner, testified in the vaguest of generalities that the Soviet Government would take care of everything and everybody once they reached Armenia, but added on cross-examination (R. 117):

> "In the case of Choolokian's children no special arrangements have been made."

When asked whether he had himself ever been in Armenia, the witness at first refused to answer and then admitted that he had been there once as a tourist in 1936 (R. 116-7).

A Bishop of the Armenian Church in America, likewise called by petitioner, testified that although in Soviet Armenia "All education is in charge of the State" (R. 264), there was complete religious freedom. He was not asked about other subjects. He gave his testimony on the basis of a month's trip to Armenia in 1945, during which he spent two weeks in a monastery and the other two weeks in the capital (R. 263).

The Vice-Chairman of the so-called Committee to Aid Repatriation of the Armenians testified that there was no unemployment in Armenia and that:

> "Upon returning to Armenia, most of these people, with very few exceptions, where the people are destitute or near it or not so well off to put it, they are taking machinery pertaining to their trade, equipment, tools and other belongings. So that upon reaching there, they will not have to depend upon anyone else for employment but themselves." (R. 92)

He testified that there was a committee which formed part of the Soviet Armenian Government which had "made

all arrangements for all of the 60,000 that returned last year and the 60,000 who are returning this year." (R. 97). He could not give the slightest clue as to what these "arrangements" were; and like the Soviet Consul he conceded that there were no specific plans for this particular relator or his children (R. 96). On cross-examination he admitted that he himself had come to this country in 1920 from Bulgaria and had never in his life been in Armenia (R. 94).

It is upon the basis of this testimony that petitioner's counsel now ask this Court to overrule the unanimous findings of all the courts of New York, and in effect to make an affirmative finding that this father, who voluntarily surrendered his children some eight years ago, and who admittedly could not support them either then or at the time of the hearing, is "fit, competent and able to duly maintain, support and educate" them. It is upon the basis of this testimony that petitioner's counsel now ask this Court to hold that a Federal question exists and to determine, again overruling the unanimous findings of all the courts of New York, that Federal law gives this petitioner the "absolute right" to "promote the interests" of these children by permanently exiling them from the land of their birth.

POINT II

The so-called Federal questions argued in the petition have no genuine foundation in this record.

As this Court held in *In re Burrus,* 136 U. S. 586, 593 (1890), in the absence of a genuine and substantial Federal question

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."

Cf. Carqueville v. Woodruff, 153 F. 2d 1011, 1012 (C. C. A. 6th 1946), and cases there cited.

We repeat that the sole question properly presented for judicial determination in this case is the welfare of these three helpless children.

We are deeply concerned with that question, as were the courts of New York within whose jurisdiction it belonged. Their findings, unanimously made after full hearing and in the careful exercise of their discretion, should stand.

Petitioner's counsel now assert an absolute Federal right to override any exercise of discretion by the New York courts, and to disregard any and all findings which those courts have made, or could make, on the sole question properly involved. In their request to amend the remittitur in the New York Court of Appeals, granted by that Court (R. 444), counsel asserted, and in their petition now assert, that petitioner has an

> "absolute right to recover custody of his children in order to take them with him to Soviet Armenia."

His claim to that "absolute right" is the only so-called "Federal question" presented here.

In support of that claim of absolute Federal right, counsel seek to evade the sole proper question of the children's welfare by presenting a whole series of so-called constitutional issues having no foundation in this record.

(a) ***The so-called issue of "interference with family life".***

Throughout their petition, counsel assert an absolute and overriding Federal right, superior to all other considerations, of *this* father on *this* record to the immediate custody of *these* children, whom he surrendered because he could not provide for them.

That the unity of the family and the normal rights of parents are superior to any claims of the State are propositions which neither the State of New York nor these respondent institutions have the slightest desire to dispute. That the State of New York has a right, and indeed a duty, to step in and make provision for children when the parents cannot do so seems to be disputed only by this petitioner's counsel.

It goes without saying that the rights of a father are not absolute and indefeasible, even when he is able to maintain a home. He cannot, for example, starve or maltreat his child, or sell him into slavery. If he does, the State may, and indeed must, step in and forcibly remove the child from the family roof. The same rights and duties of the State come into active operation when, as here, the father is concededly unable to maintain a home, and voluntarily surrenders his minor children to a State welfare agency.

Even then, however, the rights and duties of the State are exercised, as far as reasonably possible, in accordance with the parents' wishes as well as in the interests of the child. The whole record of the Choolokian family

with the Department of Welfare and the courts of New York shows a most painstaking effort by all concerned, often in the face of the most serious obstacles, to reconcile the welfare of the children with the rights and wishes of the parents.

It is against the background of that record and on the facts of this case, that the courts of New York found that the interests of these children would be best served by maintaining them in the institutions where this father himself had asked to have them placed.

(b) *The so-called issue of "the right to expatriation".*

That Hamportzoon Choolokian had a right under the Constitution and laws of the United States to leave our shores and return to Soviet Armenia is another proposition which the courts of New York have not denied, and which these respondents do not dispute.

His counsel, however, now assert that his right of expatriation is so absolute and so overriding that Federal law deprives the New York courts of all jurisdiction over their own wards, compels the State of New York to surrender the children whom he voluntarily placed in its care, and entitles him, as a matter of "absolute right," to take those children, native-born American citizens, to a place where, as the State Department and the courts have alike pointed out, their rights as American citizens will be incapable of protection, and from which they can never return* to claim their birthright.

In *Perkins* v. *Elg*, 307 U. S. 325 (1939) this Court adverted to the right of a native American citizen taken

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* At page 13 of the petition, on the basis of "judicial notice of matters of public notoriety," petitioner's counsel call the Court's attention to a statement appearing in the public press of November 2, 1947, in which a spokes-

abroad during minority by her parents to reclaim citizenship on attaining majority, and indicated that that right was so important and so precious that even a formal treaty with Sweden should not be construed as disparaging it. We refrain from making any comparison between Sweden and Soviet Armenia.

If there is one undisputed fact in this case, it is that at the time of the hearing Hamportzoon Choolokian was incapable of supporting his children. He so testified himself, and his counsel so conceded. Counsel for the Department of Welfare stated flatly that for that reason the Department would not have even considered releasing the children to him in New York.

Under the claim of "expatriation", his counsel now assert that although he had no right to reclaim his children to have them live with him in New York,—or for that matter in Connecticut or any other state—his mere statement of his intention to take them to Armenia gives him such a right, absolute and indisputable in terms. That

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man for the Committee to Aid the Repatriation of Armenians stated that about 30,000 Armenians residing in the United States had expressed their desire to return to Armenia. Nothing like that number actually went. There have been press reports since, including particularly one in the New York Times of March 14, 1948, on the unfortunate plight of those Armenians who thus returned.

The New York Times article (reproduced as an appendix to this brief) reports on the shooting or imprisonment of more than 450 repatriated Armenians who tried to escape, and refers as follows to the group which left with this petitioner on the S. S. Rossia:

> "One group of more than 150 Armenians from the United States is reported to be especially distressed. More than 90 per cent of them wish to return to the United States and almost all of the remainder are unhappy but cannot think of leaving because of family reasons."

The article adds that the attempts by these unhappy people to communicate with their embassies in Moscow have been blocked. This is fully in accord with the State Department's pronouncement at R. 384-5, discussed *infra* at pages 25-6.

"absolute right" is asserted in the face of a concession that he could not support his children and in the face of a finding by the trial court, affirmed on appeal, that there was no credible evidence as to how they would be supported in Armenia. In a nutshell, counsel now say that Hamportzoon Choolokian's right of expatriation is so broad, so overriding and so absolute as to preclude all other considerations, and that once he asserted his intention of going to Soviet Armenia the Federal Constitution interposed a barrier around the entire family, and prevented the courts of New York from determining, or even inquiring into, what was in the best interests of the children whom he had committed to the State's care.

We say that any such claim of Federal right is wholly unfounded. No such claim was made in the petitions for the writs of habeas corpus (R. 15-18, 24-26). No such claim was advanced in the trial court. On the contrary, the case was there litigated on what petitioner's own counsel asserted (R. 42) was the sole question properly before the courts,—namely what would be best for the children. It is conceded, and was established by the testimony, that the father would have had no right to regain them if he had stayed in the United States. The courts of New York simply decided that a right which was non-existent if the children were to stay in New York did not become "absolute", overriding and indefeasible when the father said he wanted to take them outside our jurisdiction.

(c) *The so-called issue of "treaty rights".*

Throughout the petition, counsel repeatedly assert that the painstaking efforts of the New York courts, the public authorities, and these respondent institutions, to protect the welfare of these unfortunate children constitute "a flagrant interference with the foreign relations of the

United States" and a violation of an alleged "compact or agreement" having "the force of a treaty".

What is this alleged "compact or agreement"?

In the first place, it is certainly a belated afterthought on the part of petitioner's counsel. The documents which they now assert to have constituted that "agreement" (Respondent's Ex. F and G, R. 383-5; *cf.* Petition, pp. 5-7), and upon which they now base almost their entire claim, formed no part of their evidence below. What is more, when we—the respondents—offered those documents in evidence, *petitioner's counsel strenuously objected that they were "incompetent, irrelevant and immaterial"; and they were admitted only over his objection and exception* (R. 341).

In the second place, the alleged "compact or agreement" on its face is nothing of the sort.

It consists of an exchange of notes between the Soviet Embassy and the State Department (R. 383-5).

On April 21, 1947, the Soviet Embassy wrote to the State Department (R. 383) advising simply that the Soviet Government had authorized the Government of Soviet Armenia to organize "the return of Armenians wishing to emigrate to their homeland", and asking the State Department to "render assistance to Armenians wishing to emigrate to their homeland in granting permission for their emigration, the export of property belonging to them, the relinquishment of foreign nationality, et cetera".

A month later, on May 28, 1947, the State Department replied (R. 384). This reply, which petitioner now asserts had "the force of a treaty", amounted in substance to a statement that the Soviet request was unnecessary, since the United States (unlike Soviet Russia) does not pursue the policy of detaining or imprisoning those of its citizens who wish to leave its territory. The operative provisions

(if they can be called that) of the State Department's reply were contained in this single paragraph:

> "American citizens, or alien residents of the United States except German or Japanese nationals, who desire to emigrate to the Soviet Union are freely permitted to do so. No exit visas are required, and such emigrants are at liberty to take their personal property with them. American citizens may voluntarily relinquish their American citizenship by making a formal declaration of allegiance to a foreign country in accordance with the laws thereof." (R. 384)

This is nothing more than a simple statement of existing American law. Indeed, petitioner's own counsel so described it when he said at page 45 of his brief in the trial court

> "The correspondence, now in evidence, shows simply that the State Department conformed to existing law."

For the same counsel now to call the same correspondence an international "compact or agreement", or to say that it has the "force of a treaty", is nonsense.

The State Department, however, went on to make some further remarks, which petitioner's counsel throughout this proceeding have been extremely anxious to forget, but which the trial court took occasion to consider. After stating that our Government "will interpose no objections to the departure of persons of Armenian origin from the United States to the Soviet Union", the State Department in forceful language reminded the Soviet Government of some ugly facts.

In the first place the State Department pointed out that "persons with claims to American citizenship" had

been forcibly removed to the Soviet Union from various countries of Eastern Europe and that

> "All efforts of the American Embassy in Moscow to obtain permission to interview these people with a view to establishing their American citizenship and arranging for their return to the United States have been fruitless." (R. 384-5).

In the second place the State Department pointed out that Soviet women married to American citizens "for many months, and in several cases years", had vainly sought permission to leave the Soviet Union in order to join their husbands in the United States. The Department added:

> "The continued refusal of the Soviet authorities to permit the departure of these wives of American citizens is incomprehensible to the Government and the people of the United States." (R. 385)

It was after alluding to this official pronouncement of our Government that the trial court pungently stated in its opinion (R. 389):

> "Probably at no other time in our history as a nation have we been confronted with a situation where our citizens have been treated virtually as prisoners by a foreign power with whom we are at peace." *

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* The remonstrances of the State Department and the remarks of the trial court about the "incomprehensible" policy of the Soviet Government in holding prisoners all those unfortunate enough to come within its clutches received dramatic confirmation, shortly after the trial, in the case of Mrs. Kasenkina. That lady, it will be recalled, was held prisoner *in New York City* by the same Soviet Consulate whose representative testified at the trial. She escaped only at the risk of her life by jumping out of a window, after the Consul General had flouted a writ of *habeas corpus*. The State Department thereupon demanded the recall of the Consul General; and the Soviet Consulates in New York and San Francisco were closed. (9 Dept. State Bull. 251-53, 408-9 (1948); New York daily papers of August 21 and 25, 1948) There is no American consular or diplomatic official today in Armenia, or anywhere else in Soviet territory outside Moscow. On the chances of escape from Armenia, cf. *supra*, p. 21, footnote.

And it was with this pronouncement of our Government in mind that the trial court went on to say (R. 390-1):

> "If the father were permitted in this case to take these three infant children to Soviet Armenia, it seems clear under present conditions that their right to avail themselves of the privileges of their American citizenship might be forever lost. It is unthinkable that an American court could permit this father to place his infant children in such an irretrievable position. While he may make that choice for himself, it will certainly not promote the best interests of the children, as this court is required to find by Section 383 of the Social Welfare Law, to permit the father or anyone to dissipate beyond redemption these priceless rights of the children. The exercise of these rights should not be left to the remote chance that they might some day before their twenty-third birthday be able to escape from Armenia and return to the United States."

The right of an American citizen to expatriate himself, so laboriously argued throughout the petition, we do not in the slightest degree dispute. That right existed and still exists, altogether apart from the State Department's letter which counsel now seek to dignify with the name of "treaty". That letter did not, and could not, either add to or detract from that right in the slightest degree. In the exercise of that right this petitioner left the United States over two years ago. What his counsel now seek, in the name of an international "compact or agreement", is to convert a simple statement of existing law by our State Department into an engine of oppression. In the name of "treaty rights", counsel now ask this Court to take unwilling native-born

American citizens, voluntarily surrendered by their father, from the custody in which he and the public authorities of New York have placed them and in which the courts of New York have said they should remain, and to ship them to a place from which, as the State Department has forcibly pointed out, there can be no return.

(d) ***The so-called issue of "religious interference".***

This issue was summarily but adequately disposed of at the close of the trial court's opinion (R. 397). We mention it only to refute the repeated mis-statements in the petition and supporting brief.

Throughout the petition, counsel seek to give the impression that this entire case is based on a sinister plot by the two respondent institutions to keep the children away from their father in order to "impose upon them" a Catholic upbringing. Nothing is further from the truth.

In order to safeguard religious rights when homes are broken up and the State is forced to step in, the Legislature of New York has enacted in Subsections (1), (2) and (3) of Section 373 of the Social Welfare Law that whenever a child is committed, surrendered, boarded out or placed for adoption, he must "when practicable" be placed in the custody of a person or institution "of the same religious faith as that of the child". Subsection (4) of Section 373 specifies that the provisions of the preceding subsections

> "shall be so interpreted as to assure that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be preserved and protected."

The entire record of this case demonstrates the most careful efforts by both the public authorities and these

respondent institutions to comply with this mandate of the law and to follow and respect the frequently conflicting wishes of petitioner.

The Case History of the Department of Welfare shows that all of the Choolokian children except the youngest were originally baptized in the Armenian Church* (C.H. 18-19).

When the father on March 17, 1942 was on the point of surrendering his children to the public authorities, the Department of Welfare gave him "a complete explanation of the method of placing children according to religions" and told him that it would be necessary for him to give an affidavit setting forth his preference. At the end of this explanation the father

> "stated very emphatically that he did not wish his children placed as Protestants; that he was a Catholic and regardless of whether he believed in the Pope or not all his children must be placed in Catholic homes. He added that he would be willing to have all his children re-baptized in the Roman Catholic faith and was pleased to know that we had asked his opinion before making the placement." (C.H. 20)

He thereupon gave the Department of Welfare an affidavit indicating his desire for a Catholic placement (C.H.

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* The Armenian Church is one of the very ancient Christian communities of the East (R. 262). Like the Coptic Church of Egypt, it has been out of communion with both the Catholic and Eastern Orthodox churches since the Monophysite controversies of the fifth and sixth centuries. Cf. Encyclopaedia Britannica, s. v. "Armenian Church".

Petitioner was apparently a more or less nominal member of an Armenian congregation in New York. The Department of Welfare's Case History records a conference in 1942, when the Department's social worker suggested that he consult his priest on some of his family problems, and he replied that he went to church so seldom that he didn't know the priest's name (C.H. 24).

20). The children were accordingly committed to the respondent Mission and the respondent Hospital (C.H. 20). Indeed, in the two petitions for *habeas corpus* which initiated this proceeding, petitioner specifically alleged that he "voluntarily placed" the children "at the Mission of the Immaculate Virgin in Staten Island" and "at the New York Foundling Hospital" (R. 16, 25). It should be noted in passing that as far back as 1937 four of the children had undergone previous commitments to Catholic institutions with no apparent objections by either parent (C.H. 11).

On April 7, 1942 the respondent Foundling Hospital, to which the youngest child Alice had been transferred directly from Bellevue Hospital, where she had been born, reported to the Department of Welfare that on checking the records it had discovered that the older children had been baptized in the Armenian Church. According to the record of the Department of Welfare, the respondent Hospital, a Catholic institution,

> "added that father recognized the fact that he is not a Roman Catholic and although he had signed a baptismal consent for Alice and had desired to have her baptized in the Roman Catholic faith, they have hesitated to do this. For that reason they could not accept the five children and suggest that they are placed in an institution of their own faith." (C.H. 22)

Ten days later, on April 16, 1942, the father again called at the Department of Welfare, again claimed that he considered himself a Catholic, stated that he desired to have his children remain in a Catholic institution, and added

> "I do not want my children in a Protestant institution. I am glad you placed them in a Catholic institution." (C.H. 23)

This information was reported by the Department of Welfare to the Supervisor of the respondent Hospital. Again it was this Catholic institution which raised objections, the Supervisor stating

> "that they get many such requests, but must know that family will continue in the Roman Catholic teachings, before they baptize any children under their care to the Roman Catholic faith." (C.H. 23)

About two weeks later, on April 29, 1942, apparently as a result of discussions with a Protestant clergyman, the father seems to have changed his mind (C.H. 23). On May 1, 1942, he called at the Department of Welfare and stated that he wanted his children to remain members of the Armenian faith. On this occasion he

> "repeated that he is not a Protestant, does not want his children in an institution of that faith but does not want them in a Roman Catholic institution either." (C.H. 24)

The children were thereupon listed by the Department of Welfare for transfer away from the respondent institutions, but without success. In February 1943 the father reported to a case worker of the Department of Welfare that

> "he has since discussed the problem with his church members and learned that the Protestant religion would be more like his own." (C.H. 25)

The Department of Welfare, with the cordial assistance of the respondent institutions, thereupon made further efforts to transfer the children, but without success, since no Protestant institution could be found with vacancies.

The father's indecision apparently continued; and on April 19, 1944, he visited the Department of Welfare, where the situation was again explained to him, and he was told that since the respondent Mission was a Catholic institution it could not keep his children indefinitely, and that the Department was therefore still endeavoring to arrange a transfer. At this point the father "became very aggravated", said that he would not consent to their transfer as they were happy where they were, and asked to sign another affidavit giving his consent to have the children baptized as Catholics (C.H. 27). The representative of the Department of Welfare suggested that before doing this he consult the same Protestant minister whose advice he had previously followed. At that point the father said that the minister in question was no longer connected with the church and

> "furthermore this is a free Country where one can make one's own decision regarding his church therefore he does not feel it is necessary to consult with any one other than his children." (C.H. 27)

The children accordingly remained where they were. Six months later, on October 19, 1944, the father again signed affidavits asking to have the children baptized and reared as Catholics (C.H. 30). This was the last official entry with respect to their religious affiliation until the present controversy arose.

In the face of this record, placed in evidence by petitioner's own counsel, it is idle to contend, as counsel now do, that the children were "baptized in the Roman Catholic Church at the insistence of the said two institutions" or that the father's consent was extorted by force or fraud.

The trial court correctly summed up, and dismissed, the so-called "religious issue" as follows (R. 397):

> "While there was considerable testimony regarding the religious affiliation of the children it is not a consideration necessary to any determination here. Of course, the father may during the minority of the children determine for them the matter of their religious education and affiliation just as he has done in the past (Matter of Varinakis, 160 Misc., 13)."

In conclusion, we may point out, as petitioner's counsel did in his briefs in the lower appellate courts, that a separate and subsequent proceeding is now pending in the courts of New York to compel the transfer of these children from respondent institutions either to a Protestant orphanage or to an Armenian foster family. That proceeding has not reached the stage of final hearing; and it is of course complicated not only by the frequent vacillations of the father in the past, but by the practical difficulties of obtaining authentic evidence of his present wishes. The relief sought in those proceedings, and any decision to be rendered therein, should not affect the sole issue here, which is whether these American children should now be sent behind the Iron Curtain.

CONCLUSION

Stripped of all extraneous issues, mis-statements, and half truths, the facts in this case add up to the following:

(1) In 1942 the father surrendered these children to the custody of these respondent institutions, where they have been ever since and where, as the father himself admitted at the trial, they are well cared for.

(2) At the trial the father testified, and his counsel twice conceded, that he could not then support them.

(3) The courts of New York have unanimously found the father unfit.

(4) Since the trial his children have not heard from him.

(5) The children are all native-born American citizens, speak no Armenian, and have never been in Armenia. The youngest has never been in her father's care.

(6) The alien mother, when she left the United States, was hopelessly insane. She has not been heard from since.

(7) The oldest daughter, when confronted with the possibility of being taken to Armenia, ran away from home.

(8) The sole question for judicial determination is one of fact,—namely, what is best for the welfare of the children.

(9) That question has been carefully considered and unanimously determined by the courts of New York.

In the face of these facts petitioner's counsel now ask this Court to take jurisdiction and to hold that the Federal Constitution gives this father, unanimously determined by all the courts of New York to be unfit, an absolute right to take his American-born children away from the land of their birth and commit them to the custody of the Soviet Government. In the name of the Federal Constitution, petitioner's counsel now assert that he has an absolute right to override any and all findings of the New York courts and to force the exile of these American children to an unknown fate in a land from which there can be no return.

To enforce that asserted absolute Federal right, petitioner's counsel now request this Court to take jurisdiction. For such a request we submit there is no sound basis in fact, in law or in justice.

The petition for certiorari should be denied.

Dated, New York, N. Y.,
February 9, 1950.

CHARLES G. COSTER
Attorney for Respondent Mission of the Immaculate Virgin

JOSEPH V. MCKEE
Attorney for Respondent New York Foundling Hospital

PORTER R. CHANDLER
Of Counsel

APPENDIX

Text of article in New York Times, March 14, 1948, page 25, columns 1 and 2.

ARMENIANS FIND NATIVE LAND A DISAPPOINTMENT ON RETURN

SOME TRY TO ESCAPE AFTER COMING BACK TO SOVIET REPUBLIC—CAMPAIGN CIRCLES GLOBE

BY C. L. SULZBERGER
Special to the New York Times

GENEVA, March 11—Since the end of the second World War, Moscow propaganda has been conducting a protracted campaign designed to induce immigration to the Soviet Republic of Armenia of the scattered refugees from this nation that has known no true independence since the heyday of its medieval glories.

Broadcasts from Moscow and Tiflis as well as propaganda material in the Armenian language prepared both in Moscow and in the republic's capital of Erivan have been circulated to Armenian colonies around the world.

This propaganda has had considerable effect among the Armenians in Turkey [who have received it by underground means], Lebanon, various European countries and especially France and the United States.

Special "repatriation ships" have taken hundreds of Armenians "back to the fatherland"—the Soviet Armenian Republic—during the past year.

What Has Become of Them?

What has become of these Armenians, who have been seeking contact with their compatriot descendants of the great medieval kingdoms of Ani, Aklat and Diarbekir?

For the first time this correspondent has received some accurate reports from Erivan and Leninakhan, the latter a principal town of Soviet Armenia that is situated on the main trunkline between Baku and Turkey.

According to this information, which may be classified as reliable, many "returning Armenians" have been extremely disappointed with the situation—especially living conditions—that they have encountered after having established their new homes.

So strong have been their feelings of distress that a large group of Armenians who had come from France—some reports fix the figure at more than 450—attempted to escape from the Soviet Union.

Several Were Shot

Some of this group succeeded in slipping across the border but most were forestalled. Several were shot and many more placed in forced-labor camps.

One group of more than 150 Armenians from the United States is reported to be especially distressed. More than 90 per cent of them wish to return to the United States and almost all of the remainder are unhappy but cannot think of leaving because of family reasons. This is the case despite the fact that Armenians from America receive favored treatment as compared with all other immigrants to the Caucasus republic.

The Soviet Union has been propagandizing this program of returning "foreign Armenians" to their "father-

land." Thus, for example, those coming from America received excellent accommodations on the Soviet steamship Russia and a highly touted reception when they landed at Batum.

Before moving to their new homes they were asked to write to their families still abroad, explaining the advantages of returning to their native land. These letters were used by Soviet authorities for propaganda purposes.

Letters for Propaganda

Thus the magazine Ogonek [which is printed in the huge Moscow plant of Pravda, Communist party newspaper] published pages of excerpts from these letters under the title, "From the World of Capitalist Slavery to Soviet Armenia."

However, according to informants, this initial outburst of sentimental enthusiasm soon cooled. Not only were the immigrants keenly disappointed by the low living standards they had encountered, but they were irritated by the resentment with which they had been greeted by their new Soviet Armenian neighbors.

Several instances of actual physical hostility are known to have occurred. These included attacks upon immigrants and slitting their clothing with razor blades. There were other cases of hurling rocks through the windows of their new homes.

Older residents of Soviet Armenia, whose towns are overcrowded and short on housing, grumbled, "We didn't ask you to come here."

In all fairness, there appears to be every indication that Soviet official authorities are trying to curb this native resentment and assist the newcomers. But it is difficult to

supervise this movement because it appears to arise from below.

The immigrant Armenians are said to feel especially disconsolate when they realize they are cut off from the outside world. Many have written to embassies and legations of nations they left. These communications have been returned from Moscow marked "unaccepted."

Supreme Court of the United States

OCTOBER TERM—1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Respondent Hilliard's Position

This brief by the respondent, Raymond M. Hilliard, as Commissioner of Welfare of the City of New York, represents the first statement on either side of this controversy which has been made by this Respondent since the incep-

tion of this litigation by writ of habeas corpus, issued out of the Supreme Court of the State of New York, New York County in October, 1947. Throughout the proceedings in the Supreme Court this Respondent took the position that the question as to whether the three children of Hamportzoon Choolokian should be released from his legal custody to their father in order that he might take them to Soviet Armenia, was one for determination by the courts of the State of New York. The Respondent Commissioner recognized the fact that the issues raised in this litigation were novel insofar as they involved the transfer of children in the custody of the Commissioner to a father who had been unable to provide a home for them in order that that father might take them to a foreign country. He also recognized the merit in the arguments raised by the Respondent institutions with respect to the character of the foreign country to which it was desired to take the children. The Respondent Commissioner, therefore, felt it best to leave for determination by the courts of the State of New York the question of whether such transfer of these children, who were the wards of the State, would be in their best interests.

The instant petition for a Writ of Certiorari to the Supreme Court of the United States, however, presents a question which was not contemplated by this Respondent at the time the Petitioner obtained his writ of habeas corpus. The Respondent did not then nor does he now believe that there is any federal question presented by the facts of this case requiring a determination by the Supreme Court of the United States. The Respondent Commissioner, therefore, joins with the Respondent institutions in opposing the petition for a Writ of Certiorari and respectfully asks this court to deny such Writ.

The Highest Court of the State of New York Has Determined the Only Material Issue in This Case, the Welfare of the Children. There Is No Federal Question Which Requires Determination by This Court

To the extent that any conflict of evidence may have been presented in this record, any such conflict, and all issues of fact, were resolved by the findings of the trial court and these findings were unanimously affirmed by the Appellate Division, First Department, of the Supreme Court of the State of New York and by the Court of Appeals of the State of New York.

The Respondent Commissioner is bound by and accepts these findings of the courts of the State of New York. These findings are:

1. That no consent was given by the Department of Welfare to the release of the children to their father (R. 387; R. 437).

2. That the father is not fit, competent or able to care for his children (R. 436).

3. That it would not be in their best interests to be taken by him to Armenia (R. 436).

It is the Respondent's belief that no federal question has survived the determination of the highest court of the State of New York. All the questions which were raised in this case are encompassed within the provisions of the Social Welfare Law of the State of New York. Section 383, subd. 1* of that law clearly provides that the parent

* Section 383, subd. 1 of the Social Welfare Law reads as follows:

"The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

of a child remanded or committed to an authorized agency shall not be entitled to the custody of such child except upon consent of the official responsible for the commitment of the child, or for want of such consent, upon the order of a court of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. A welfare official is encompassed within the meaning of the phrase "authorized agency." (Section 371, subd. 10(b), Social Welfare Law.)

By Section 383 of the Social Welfare Law the duty is placed upon the court of making affirmative determination that the interest of the child will be promoted by a release to the parent and that the parent is fit, competent and able to maintain, support and educate the child. The courts of the State of New York have found that this father was not fit and that the interests of the children will be very poorly served by a release to his custody. They are, therefore, precluded by the statute from acceding to the father's request even though such request was made in connection with the exercise by the father of his right of expatriation.

No one has challenged the constitutionality of Section 383 or of any other provision of the Social Welfare Law of the State of New York.

With respect to the alleged treaty between the United States and the Soviet Union which is claimed to have been violated, there is nothing in the record to establish the existence of such a treaty. The Respondent Commissioner fully endorses the view set forth by the Respondent institutions in their brief, that the correspondence between the State Department of the United States and the Soviet Embassy relative to the return of persons of Armenian origin did not constitute either a treaty or any compact or agreement. The notes which were exchanged between the Soviet Embassy and the State Department (R. 383-5)

merely represent an expression by our State Department of existing law and of existing provisions available, without the need for further treaty or agreement, to persons of Armenian origin who wished to return to their native land.

The Respondent Commissioner has been from the very outset concerned with the one question upon which the proper discharge of his duty is based, to wit, how will the best interests of these children be served? He left this question to the courts and the highest court of the State of New York has made a final determination.

We respectfully submit there remains no other question which can, with any validity, be presented to this court.

The petition for Writ of Certiorari should be denied.

Dated: New York, February 10, 1950.

Respectfully submitted,

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